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10 **UNITED STATES DISTRICT COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA**

13 KEVIN SPACEY FOWLER a/k/a) Case No. 2:22-mc-00030
 14 KEVIN SPACEY,)
 15 Moving Party,) *Pending in the Southern District of*
 16 v.) *New York, Case No. 1:20-cv-09586-LAK*
 17)
 18 ADAM VARY) **JOINT STIPULATION REGARDING**
 19) **MOVING PARTY'S MOTION TO**
 20 Responding Party.) **COMPEL AND FOR CONTEMPT RE**
 21) **ADAM VARY'S DEPOSITION AND**
 22) **SUBPOENA FOR PRODUCTION OF**
 23) **DOCUMENTS**
 24)
 25) Judge: TBD
 26) Hearing Date: March 2, 2022
 27) Hearing Time: 9:30 a.m.
 28)
 29) Discovery Cutoff Date: January 18, 2022
 30) Pretrial Conference Date: N/A
 31) Trial Date: February 18, 2022
 32)

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JOINT STATEMENT

2 Pursuant to Federal Rules of Civil Procedure 37 and 45, and C.D. Cal. Local Rule
3 37-1 *et seq.*, plaintiff Kevin Fowler a/k/a Kevin Spacey Fowler (“Mr. Fowler” or
4 “Moving Party”) and non-party deponent Adam Vary (“Mr. Vary”) have met and
5 conferred regarding discovery of documents and information sought by Mr. Fowler’s
6 Subpoena to Testify at a Deposition in a Civil Action (“Deposition Subpoena”) and
7 Subpoena to Produce Documents, Information, or Objects, or to Permit Inspection of
8 Premises in a Civil Action (“Document Subpoena,” and collectively with the Deposition
9 Subpoena, the “Subpoenas”). Mr. Fowler and Mr. Vary have been unable to reach an
10 agreement at this time, and respectfully submit their positions.

11 | I. INTRODUCTORY STATEMENTS

A. Moving Party Kevin Spacey Fowler's Introductory Statement Pursuant To C.D. Cal. Local Rule 37-2.1

13 This discovery dispute concerns a civil lawsuit pending in federal court in the
14 Southern District of New York. The case was brought in late 2020 by plaintiff Anthony
15 Rapp (“Rapp”) alleging assault, battery, and intentional infliction of emotional distress
16 against Mr. Fowler. The lawsuit is nearing trial, with pretrial documents signaling the
17 case is “ready for trial” being due February 18, 2022. As an initial matter, Mr. Fowler
18 respectfully requests that the Court transfer this dispute to the Southern District of New
19 York under Federal Rule of Civil Procedure 45(f). Such transfer would promote judicial
20 economy and efficiency because the trial judge in the Southern District of New York,
21 The Honorable Lewis Kaplan, is intimately familiar with the facts and history of this
22 case, and it is rapidly approaching trial.

23 Rapp's claims all are based on an alleged incident in approximately 1986 when
24 Mr. Fowler purportedly picked up Rapp, lifted him onto a bed, and laid on top of him.
25 Rapp has acknowledged Mr. Fowler's alleged "sexual advance" involved no touching of
26 genitals, no kissing, no undressing of either Rapp or himself or any attempt to do so, and
27 no sexualized statements or other statements suggesting an intent to engage in any such
28 conduct. Mr. Fowler categorically denies the allegations.

1 Rapp's claims were initially publicized in a *Buzzfeed* article published on October
 2 29, 2017 and written by Rapp's longtime friend, Adam Vary. During discovery, Mr.
 3 Fowler served Mr. Vary with deposition and documents subpoenas seeking information
 4 about his communications with Rapp since they became friends over twenty years ago,
 5 the preparation and circumstances of the *Buzzfeed* articles, and related matters. In
 6 particular, Rapp produced texted messages with Mr. Vary which showed that Rapp
 7 initially told Mr. Vary a version of his story that had demonstrably false details. Those
 8 details were omitted or corrected in the final article, apparently as part of an express or
 9 implied understanding that Rapp would provide his story to his friend if Mr. Vary
 10 sanitized the article to protect Rapp from scrutiny for his inconsistencies and false details.

11 But during his deposition, and in response to the records subpoena, Mr. Vary
 12 refused to answer questions, about any communication with Rapp other than what was
 13 explicitly published in Mr. Vary's 2017 *Buzzfeed* article or a follow-up article in 2018.
 14 Mr. Vary followed his counsel's instruction not to answer questions about Mr. Vary's
 15 conversations with Rapp, Mr. Vary's investigation or view of Rapp's allegations, or even
 16 foundational issues related to Mr. Vary's vetting of Rapp's claims (or his failure to
 17 factcheck them). Mr. Vary further refused to answer whether he deliberately altered or
 18 omitted demonstrably false details of Mr. Rapp's account when seeking comment from
 19 Mr. Fowler. Mr. Vary also produced no documents in response to the records subpoena
 20 and even acknowledged he did not even attempt to look for any documents responsive to
 21 the subpoena.

22 To justify his refusal to provide discovery, Mr. Vary relied primarily on a qualified
 23 "reporter's privilege" under the First Amendment and a "reporter's shield" under
 24 California law. But neither applies here. As an initial matter, the only possible
 25 application of either doctrine applies to a narrow set of circumstances that Mr. Vary has
 26 not demonstrated apply here, or at least not to each question and document request.

27 Even if there were protection under the First Amendment, the protection is
 28 qualified, and it must give way when the requested material is unavailable despite efforts

1 to obtain it elsewhere, is noncumulative, and is clearly relevant to an important issue in
 2 the case. Here, all of these factors are present. Rapp's credibility and the details of his
 3 allegations are critical issues that will be the focus of the upcoming trial. Mr. Fowler has
 4 deposed and taken written discovery from Rapp but Rapp has testified he does not recall
 5 all details of what he told Mr. Vary. The only way to obtain that critical evidence is from
 6 Mr. Vary and any notes, recordings, or other documents he may have in his possession.

7 Likewise, California's reporter's shield law does not apply. If anything, New
 8 York's reporter's shield applies because New York has a greater interest in this case,
 9 given the case is pending there, New York law applies to the dispute, Rapp is a citizen
 10 in New York, and Buzzfeed – which published Mr. Vary's articles at issues – is located
 11 in New York. And New York's reporter's shield provides only qualified protection
 12 similar to that under the First Amendment test described above. And, finally, even if
 13 California's "absolute" reporter's shield law were to apply, it still have been found not
 14 to apply where it impedes a criminal defendant's rights. Because Rapp's claims are
 15 premised on conduct he must show constitutes criminal conduct under New York's penal
 16 law, the same balancing test should apply and weigh in favor of disclosure.

17 Mr. Fowler therefore respectfully requests that the Court grant his motion and find
 18 Mr. Vary to be in contempt unless he sits for a supplemental deposition to answer the
 19 question he previously refused to answer (plus all reasonable follow up questions) and
 20 produces documents in response to the requests in the documents subpoena.

21 **B. Responding Party Adam Vary's Introductory Statement Pursuant to
 22 C.D. Cal. Local Rule 37-2.1**

23 Non-party Adam Vary is a journalist, and his only connection to this case is in his
 24 capacity as a journalist. In 2017, Vary authored an article for his former employer
BuzzFeed about famous actor Kevin Spacey Fowler's (p/k/a Kevin Spacey) sexual
 25 advance on actor Anthony Rapp, who was only 14 years old at the time. Jassy Decl. ¶ 3,
 26 Ex. 10; *see also* Jassy Decl. ¶ 2; *id.*, Ex. 11 at 70:7-11, 77:17-90:16, 90:2-93:22 (Vary
 27 work history). Fowler did not claim that Vary's article was false in any way; rather,
 28

1 Fowler tweeted that he did not remember the encounter with Rapp, and apologized for
 2 “what would have been deeply inappropriate drunken behavior.” Ex. 10 at 4. Four years
 3 later, Fowler issued three document subpoenas (each with at least 29 requests for
 4 production), and deposed Vary for more than seven hours. Jassy Decl. ¶¶ 4-5. Now,
 5 *after* the discovery cut-off and *after* the ready date for the start of trial, Fowler wants to
 6 depose Vary again—this time with the specific goal to invade his journalistic processes
 7 and unpublished information. On several grounds, this motion should fail.

8 As a preliminary matter, Fowler’s motion is procedurally defective for many reasons: (1)
 9 it is late—filed after the discovery cut-off, to be heard after the trial ready date; (2) it fails
 10 to comply with L.R. 37-1, 37-2.1, and L.R. 37-3; and (3) it suffers other procedural
 11 defects enumerated below. Fowler makes a passing request to transfer this motion, but
 12 the motion must be heard in “the district where compliance is required” – *i.e.*, in this
 13 Court – unless Vary consents (he does not) or there are “exceptional circumstances.”
 14 F.R.C.P. 45(d)(2)(B)(i). Fowler articulates no such “exceptional circumstances.”

15 The motion also fails for substantive reasons. The premise of Fowler’s motion is
 16 also its fundamental defect—Fowler seeks unpublished newsgathering and reporting
 17 information, which is protected from disclosure under state, federal and common law.
 18 California’s Constitution provides an unqualified *absolute* protection from disclosure in
 19 civil cases. Fowler has no competing constitutional right that can overcome Vary’s right
 20 to keep his unpublished information confidential. Fowler incorrectly asserts that New
 21 York, not California law, should apply to this discovery dispute. A basic conflict of law
 22 analysis proves this wrong. Vary is, and at all relevant times was, a California resident,
 23 and California has a strong interest in protecting the constitutional rights of its citizens.¹
 24 In another desperate attempt to avoid California law, Fowler claims, in a motion brought
 25 under Federal Rule of Civil Procedure 45, that this is not really a civil case. Nonsense.
 26 When Fowler’s counsel was asked in the meet and confer process, “If Fowler loses this
 27

28 ¹ Fowler notes that Rapp is in New York, but the subpoenas were not directed to Rapp. Nor were the subpoenas directed to BuzzFeed, Vary’s *former* employer.

1 civil case that would mean that he is a criminal?,” his counsel candidly replied: “Of
 2 course not.” He faces no *criminal* liability at all. Because this is a civil case, with Rapp
 3 asserting civil claims of assault, battery, and intentional infliction of emotional distress,
 4 California law completely insulates Vary from having to share any unpublished
 5 information.

6 Vary is also protected by the Ninth Circuit’s qualified First Amendment reporter’s
 7 privilege. To overcome that privilege, it is Fowler’s burden to show that each piece of
 8 information or document he seeks is clearly relevant to his case, not cumulative, and
 9 unavailable from any other sources. Fowler glosses over this burden in a general way,
 10 and makes *no effort* to show he can satisfy it as to *each* deposition question and *each*
 11 document demand. Unpublished information about Vary’s work is not clearly relevant
 12 to this case. This case is not about the veracity of Vary’s articles or Vary’s state of mind.
 13 In many of his questions, Fowler’s counsel simply asserted that some fact was incorrect
 14 or unaccounted for, and then demanded to know why it was not published in Vary’s
 15 articles. Much of the requested information could be sought from other sources,
 16 including the very sources that Fowler is asking about, such as a Mr. Barrowman. To
 17 the extent Fowler’s point is that Rapp has discrepancies in his story, that can be proven
 18 (or not) without piercing Vary’s privilege, and anything Vary might (or might not) offer
 19 would be cumulative.

20 As to the Deposition Subpoena, Fowler wants Vary to testify about *unpublished*
 21 information about Vary’s journalistic techniques, sources and interviews specifically
 22 concerning his reporting on the Fowler matter. Almost every time Vary’s counsel made
 23 an objection/instruction on reporter’s shield/privilege grounds, Vary’s counsel only
 24 made it “to the extent” the question called for *unpublished* information, but consistently
 25 noted that Vary could “otherwise answer the question.” And Vary did just that. As
 26 Fowler acknowledges—Vary already testified in deposition about *published* information.
 27 He did not indiscriminately refuse to answer seven hours of questioning. He did not
 28 move to quash the entire subpoena. He only declined to answer where he determined

1 that it would invade the protections afforded him as a journalist. In addition to testifying
 2 about published information, he also testified about information separate from his news
 3 reporting—*e.g.*, concerning his friendship with Rapp, BuzzFeed’s finances and
 4 communications with Rapp’s counsel.

5 Vary drew consistent lines for the Document Subpoena: (1) he offered published
 6 articles concerning Fowler, but they were rejected; (2) he produced his limited
 7 communications with Rapp’s counsel; (3) he would *not* produce unpublished
 8 newsgathering information because of the reporter’s privilege/shield; and (4) he would
 9 not undertake to search for or produce irrelevant documents – *i.e.*, documents that did
 10 not relate to Fowler, Rapp and the allegations in this case – unless Fowler could articulate
 11 a reason they were relevant, which did not happen. Fowler also insists on a privilege log
 12 even though Vary already explained categorically what was being withheld pursuant to
 13 the reporter’s privilege, and Fowler ignored Vary’s authorities exempting non-parties
 14 from preparing logs under such circumstances.

15 Fowler’s counsel was obligated to take “reasonable steps to avoid imposing undue
 16 burden or expense” on a subpoenaed non-party. FRCP 45(d)(1). Instead, Fowler
 17 continues to harass Vary. Vary requests that Fowler’s motion be denied in full, and that
 18 \$18,000 in fees and costs be awarded to Vary.

19 **II. MR FOWLER’S BRIEF SUMMARY OF DISCOVERY AT ISSUE**

20 **A. Adam Vary Refused To Answer Questions At Deposition**

21 Adam Vary was deposed remotely on December 16, 2021. One focus of the
 22 deposition was Mr. Vary’s discussions with Rapp in October 2017 when Rapp contacted
 23 Mr. Vary about doing a story about Rapp’s allegations against Mr. Fowler. Mr. Vary’s
 24 initial article on the subject was published on October 29, 2017 by *Buzzfeed*. Mr. Vary
 25 also did a follow up article in 2018 for which he also spoke with Rapp.

26 During the deposition, Mr. Vary’s counsel instructed him not to answer, and Vary
 27 refused to answer, questions about Rapp’s communications with Vary other than what
 28

1 was expressly published in Mr. Vary's articles. The full questions, objections, and
 2 instructions not to answer are set forth in Section III below.

3 **B. Document Subpoenas To Adam Vary**

4 Besides the oral deposition, Rapp also separately subpoenaed documents from Mr.
 5 Vary. Mr. Fowler's initial document subpoena was issued on November 4, 2021.
 6 Following discussions with counsel, Mr. Fowler issued a second subpoena on December
 7 6, 2021, calling for production of documents shortly before Mr. Vary's deposition. Mr.
 8 Vary produced no documents at his deposition.

9 After the deposition, during the parties' meet and confer, Mr. Vary's counsel
 10 reiterated an objection that the subpoena had been issued on letterhead from this Court,
 11 rather than the Southern District of New York where this action is pending. On
 12 December 29, 2021, Mr. Fowler responded to that perceived concern by re-issuing and
 13 re-serving a documents subpoena issued by the Southern District of New York ("Records
 14 Subpoena"). That subpoena also dropped one of the document requests. On January 12,
 15 2022, Mr. Vary objected to that subpoena. Mr. Vary's objections set forth the same
 16 objections. He produced no documents.

17 The document requests in the Records Subpoena, Mr. Vary's objections to them,
 18 and each party's position on them is set forth below.

19 **C. Counsel for the Parties Complied With Local Rule 37-1 Pre-Filing
 20 Conference**

21 On December 29, 2021, Mr. Fowler's counsel sent a letter to Mr. Vary's counsel
 22 to initiate a meet and confer under C.D. Cal. Local Rule 37-1. See Scolnick Decl., Ex.
 23 6. Vary's counsel responded in writing on January 5, 2022. *Id.*, Ex. 7. Under Local
 24 Rule 37-1, counsel for the parties had a telephonic meet and confer on January 10, 2022.
 25 *Id.*, ¶ 8. Counsel also had a conference on January 18, 2022. *Id.*, ¶ 8. The parties could
 26 not resolve this discovery dispute.

27
 28

1 **III. MR. VARY'S RESPONSE TO MR. FOWLER'S "BRIEF SUMMARY OF**
 2 **DISCOVERY AT ISSUE"**

3 Vary objects to, and moves to strike, Fowler's "Brief Summary of Discovery at
 4 Issue" as an improper and overlong extension of Fowler's introductory statement in
 5 violation of Local Rule 37-2.1.

6 **IV. MR. VARY'S DEPOSITION**

7 **A. Specific Deposition Conduct At Issue**

8 These excerpts of testimony show the deposition questions, objections,
 9 instructions, and limited responses, at issue on this motion:²

10 1. Page 21, Line 16 to Page 22, Line 21

11 16 Q. And why did you reach out to Mr. Rapp over the
 12 17 summer?

13 18 A. There were reports that Kevin Spacey had been
 14 19 performing in a big feature film, and a colleague at
 15 20 Variety was writing about that, and I had been asked to
 16 21 ask if Anthony had comment on that -- for that story.

17 22 Q. And did Anthony have comment on that story?

18 23 A. He did not.

19 24 Q. Did Mr. Rapp discuss Mr. Fowler with you on
 20 25 that call?

21 00022

22 1 MR. JASSY: Objection. To the extent -- Madam
 23 2 Court Reporter, can you hear me okay?

24 3 DEPOSITION OFFICER: Yes.

25 4 MR. JASSY: Okay. I'm going to start a
 26 5 standing objection here because I have a feeling this
 27 6 may come up again, Mr. Scolnick. I'm going to object on
 28 7 the basis of the reporter's shield and the reporter's
 29 8 privilege. And what I mean by that is the privilege and
 30 9 the shield that's rooted in the 1st and 14th Amendments
 31 10 of the United States Constitution, the Article I,

26 2

 27 2 ² The relevant pages of Mr. Vary's deposition transcript are attached as an Exhibit
 28 3 to the Declaration of Chase Scolnick. Mr. Fowler respectfully requests that Mr. Vary be
 29 4 ordered to sit for another deposition to answer all of these questions, plus reasonable
 30 5 follow up questions. Vary, who already sat for over seven hours of deposition, opposes
 31 6 Fowler's request.

11 Section 2 of the California Constitution, Section 1070
12 of the California Evidence Code, Rule 501 of the Federal
13 Rules of Evidence, state analogs and other states, for
14 example, New York, and also the common law.

15 And so I'm going to assert the -- to that last
16 question the reporter's privilege and the reporter's
17 shield and instruct the witness not to answer to the
18 extent that it would call for or require the disclosure
19 of information obtained or sought to be obtained or
20 gathered in the course of news-gathering. But if he can
21 answer -- revealing such information, he may do so.

2. Page 40, Lines 4 to 12

4 Q. Why did you suggest using Signal to communicate
5 with Mr. Rapp?

6 MR. JASSY: Objection. Reporter's shield.
7 Reporter's privilege. It calls for unpublished
8 news-gathering information.

9 I instruct the witness not to answer, unless he
10 feels he's able to do so.

11 THE WITNESS: I am following my attorney's
12 advice not to answer.

3. Page 42, Lines 5 to 12

5 Q. What, if anything, did you do to search for
6 responsive documents to this request?

7 MR. JASSY: Objection.

8 To the extent it calls for the disclosure of
9 attorney-client privileged information, I instruct the
10 witness not to answer.

11 THE WITNESS: Following my attorney's advice
12 not to answer.

4. Page 48, Lines 9 to 23

9 Q. After the initial off-the-record conversation
10 you had with Mr. Rapp about Mr. Fowler, you had
11 additional conversations with Mr. Rapp about Mr. Fowler;
12 correct?

13 A. Yes.

14 Q. And in any of those subsequent conversations,
15 did Mr. Rapp tell you that the communications about
16 Mr. Fowler were confidential?

17 MR. JASSY: Objection. Calls for the
18 disclosure of unpublished information and -- on the
19 basis of the reporter's shield and reporter's privilege.

20 And instruct the witness not to answer, unless
21 he's otherwise able to do so.

22 THE WITNESS: Based on my -- my counsel's
23 advice, I'm not answering that question.

5. Page 64, Line 20 to Page 66, Line 1

20 Q. Have you ever spoken with Mr. Rapp about the
21 content of his book?

22 MR. JASSY: Objection to the extent it calls
23 for the disclosure of unpublished news-gathering
24 information. I object on the grounds of the reporter's
25 privilege and the reporter's shield.

00065

1 And I instruct the witness not to answer,
2 unless he may otherwise do so.

3 THE WITNESS: Prior to 2017 I probably told him
4 that I found the book very moving and enjoyed it. I
5 don't recall saying to him much more -- anything more
6 than that.

7 BY MR. SCOLNICK:

8 Q. And you separated that out to prior to 2017.

9 Why was that?

10 MR. JASSY: Well, same objection and
11 instruction as the last question.

12 THE WITNESS: I refer -- I will -- in response
13 to the -- your most recent question, I am following my
14 attorney's advice not to respond.

15 BY MR. SCOLNICK:

16 Q. Have you ever written a story about Mr. Rapp's
17 book?

18 A. I don't recall ever doing that.

19 Q. Did you ever intend to write a story about
20 Mr. Rapp's book?

21 MR. JASSY: Objection. Calls for the
22 disclosure of reporter's shield or reporter's privilege

1 23 information.

2 24 Instruct the witness not to answer.

3 25 THE WITNESS: I'm following my attorney's
00066

4 1 advice and not answering.

5 6. Page 119, Lines 4 to 13

7 4 Q. Did you intentionally omit any details of
5 Mr. Rapp's account and allegations in your story?

8 6 MR. JASSY: Objection. To the extent that it
7 calls for the disclosure of unpublished material, object
8 on the basis of the reporter's privilege and the
9 reporter's shield.

10 10 Instruct the witness not to answer. He may
11 answer, if he believes he can.

12 12 THE WITNESS: On advice of my attorney, I'm not
13 answering that question.

14 7. Page 120, Line 22 to Page 121, Line 9

16 22 Q. So Mr. Rapp provided you a detail about the
17 23 last time he had seen Mr. Fowler; right?

18 24 A. Yes.

19 25 Q. You determined that detail was not accurate;
00121

20 1 right?

21 2 MR. JASSY: Objection.

22 3 To the extent that it calls for the disclosure
23 4 of unpublished information. Instruct the witness not to
24 5 answer. Otherwise, he can answer the question.

25 6 Objection is based on the reporter's privilege
26 7 and the reporter's shield.

27 8 THE WITNESS: On my attorney's advice, I'm not
28 9 answering the question.

26 8. Page 121, Line 22 to Page 122, Line 17

27 22 Q. Okay. So Mr. Rapp told you that the last time
28 23 he had seen Spacey was at the 2008 Tonys. You
24 determined that Mr. Spacey did not present at the 2008

1 25 Tonys; right?
 2 00122

3 1 MR. JASSY: Object to the extent that it calls
 4 for disclosure of unpublished information, based on the
 5 reporter's privilege and the reporter's shield.

6 4 I instruct the witness not to answer, unless he
 7 5 feels he can.

8 6 THE WITNESS: We published that Kevin Spacey
 9 7 and Anthony Rapp were at the 1999 Tony Awards.

10 8 BY MR. SCOLNICK:

11 9 Q. Even though Mr. Rapp initially told you that he
 12 10 and Mr. Fowler were at the 2008 Tony Awards; correct?

13 11 MR. JASSY: Objection based on the reporter's
 14 12 privilege and the reporter's shield because it's asking
 15 13 for unpublished information.

16 14 To that extent, I instruct the witness not to
 17 15 answer, unless he's able to.

18 16 THE WITNESS: By attorney's advice, I'm not
 19 17 answering that question.

20 9. Page 123, Line 12 to Page 124, Line 21

21 12 Q. And you were writing that to protect Mr. Rapp
 22 13 from being contradicted about an inaccurate statement
 23 14 that he made to you; right?

24 15 MR. JASSY: Objection.

25 16 MR. SAGHIR: Objection.

26 17 MR. JASSY: Peter, if you want make your
 27 18 objection, then I'll make mine.

28 19 MR. SAGHIR: Yeah. Just objection as --
 20 objection as the question -- the statement
 21 mischaracterizing testimony.

22 22 MR. JASSY: That's right. In -- I guess under
 23 23 the New York rules, he can just object as to form;
 24 24 right? But I'll -- I'll go -- I'll go a little further.

25 25 Objection to the extent that it calls for the disclosure

26 00124

27 1 of unpublished information. And the objections on the
 2 basis of the reporter's shield and the reporter's
 3 privilege.

28 4 Instruct the witness not to answer to that
 5 extent. Otherwise, he can answer.

6 6 And I also object that the question's

1 7 argumentative.

2 8 THE WITNESS: On the advice of my attorney, I
3 9 am declining to answer that question.

10 10 BY MR. SCOLNICK:

11 11 Q. Okay. Let me phrase it a little differently.

12 12 Were you trying to protect Mr. Rapp from being
13 13 contradicted publicly?

14 14 MR. JASSY: Objection. Same objections.

15 15 Argumentative. Reporter's shield. Reporter's
16 16 privilege.

17 17 And to the extent that it calls for unpublished
18 18 information. Instruct the witness not to answer; but he
19 19 can if he's otherwise able to.

20 20 THE WITNESS: On advice of my attorney, I'm not
21 21 answering.

11
12 10. Page 128, Line 23 to Page 129, Line 6

13 23 Q. Did Mr. Rapp ever tell you why he came to you
14 24 with this story?

15 25 MR. JASSY: Objection. Reporter's privilege.

00129

16 1 Reporter's shield.

17 2 To the extent it calls for unpublished
18 3 information, I instruct the witness not to answer.

4 Otherwise, he may do so.

5 5 THE WITNESS: On the advice of my attorney, I'm
6 6 not responding to that question.

20
21 11. Page 140, Lines 8 to 18

22 8 Q. Mr. Vary, didn't Mr. Rapp tell you that another
23 9 media outlet was trying to scoop you on this story in
24 10 October of 2017?

25 11 MR. JASSY: Objection. To the extent it calls
26 12 for the disclosure of unpublished information, I object
27 13 on the basis of reporter's privilege and the reporter's
28 14 shield.

15 And I instruct the witness not to answer.

16 Otherwise, he may do so.

17 17 THE WITNESS: On advice of my attorney, I am
18 18 not answering that question.

12. Page 141, Lines 16 to 25

16 Q. Okay. So you were discussing with Mr. Rapp the
 17 potential that you'd be scooped on his allegations
 18 against Mr. Fowler in October; right?

19 MR. JASSY: To the extent it calls for
 20 disclosure of information not published -- the public, I
 21 object on the basis of the reporter's privilege and the
 22 reporter's shield and instruct the witness not to
 23 answer. Otherwise, he may do so.

24 THE WITNESS: On the advice of my attorney, I'm
 25 not answering that question.

10 13. Page 142, Line 7 to Page 145, Line 2

11 Q. Turning to Page -- Page 31 of Exhibit 103.
 12 Thirty-two. I'm sorry. We talked about this exchange
 13 earlier. And I wanted to focus on the last sentence of
 14 the top exchange that you have with Mr. Rapp.

15 And you told Mr. Rapp that, quote, Similarly,
 16 we're also going to steer away from exact specificity in
 17 the story for the party.

18 Did I read that correctly?

19 A. You did.

20 Q. And what you're referring to is your decision
 21 to not include specific details about the party at which
 22 Mr. Rapp made his allegations; correct?

23 MR. JASSY: Objection. To the extent it calls
 24 for the disclosure of unpublished information, I object
 25 on the basis of the reporter's privilege and the
 26 reporter's shield.

27 And I instruct the witness not to answer,
 28 unless he may otherwise do so.

29 THE WITNESS: On the advice of my attorney, I'm
 00143

1 not answering.

2 BY MR. SCOLNICK:

3 Q. Mr. Vary, were you trying to omit details from
 4 your story that Mr. Fowler or anyone in the public could
 5 see were inaccurate with Mr. Rapp's story?

6 MR. JASSY: Objection. Vague.

7 And to the extent that it calls for the
 8 disclosure of unpublished information protected by the

1 attorney -- excuse me -- the reporter's privilege and
2 the reporter's shield, I instruct the witness not to
3 answer. Otherwise, he may do so.

4 THE WITNESS: On the advice of my attorney, I
5 am not answering that question.

6 BY MR. SCOLNICK:

7 Q. Were you attempting to omit details in your
8 article regarding Mr. Rapp's account of his allegations
9 against Mr. Fowler to protect Mr. Rapp from being
10 contradicted publicly?

11 MR. JASSY: Objection. Asked and answered.
12 And I object on the basis of the reporter's privilege
13 and the reporter's shield and instruct the witness not
14 to answer on the grounds that it's unpublish -- calling
15 for unpublished information. But if he can answer, he
16 may do so.

17 THE WITNESS: On the advice of my attorney, I'm
18 00144

19 not answering that question.

20 BY MR. SCOLNICK:

21 Q. What specific details about Mr. Rapp's
22 allegations against Mr. Fowler did you decide to steer
23 away from in your article?

24 MR. JASSY: Objection.

25 To the extent it calls disclosure of
26 unpublished information protected from disclosure by the
27 reporter's shield and the reporter's privilege, I
28 instruct the witness not to answer. Otherwise, he may
do so.

12 And it lacks foundation.

13 THE WITNESS: On the advice of my attorney, I'm
14 not answering that question.

15 BY MR. SCOLNICK:

16 Q. Did you intend to omit specific details of
17 Mr. Rapp's allegations in your article so that
18 Mr. Fowler could not fairly respond to the allegations?

19 MR. JASSY: Objection. Lacks foundation.

20 Misleading. Argumentative. And to the extent it calls
21 for the disclosure of unpublished information, I object
22 on the basis of the reporter's privilege and the
23 reporter's shield.

24 And instruct the witness not to answer.

25 Otherwise, he may do so.

00145

1 THE WITNESS: Advice of my attorney, I am not
 2 answering that question.

3
 4 14. Page 146, Lines 2 to 13

5 2 Do you recall Mr. Rapp voicing any objection to
 6 you changing any of the details that he told you?

7 4 MR. SAGHIR: Objection. Argumentative.
 8 Assuming facts not in evidence. And mischaracterizing
 9 testimony.

10 7 MR. JASSY: Lacks foundation. And to the
 11 extent it calls for disclosure of unpublished
 12 information, I invoke the reporter's privilege and the
 13 reporter's shield and instruct the witness not to
 14 answer. Otherwise, he may do so.

15 12 THE WITNESS: I -- on advice of my attorney,
 16 I'm not answering that question.

17
 18 15. Page 147, Lines 6 to Page 148, Line 1

19 6 My question was, Did Mr. Rapp object to you
 20 omitting any details from his account before you
 21 published?

22 9 MR. SAGHIR: Objection. No foundation.

23 10 MR. JASSY: Same objections as the last
 24 question. And same instruction.

25 12 THE WITNESS: On the advice of my attorney, I'm
 26 not answering that question.

27 14 BY MR. SCOLNICK:

28 15 Q. Okay. Did you believe in October 2017 that it
 16 would be more difficult for Mr. Fowler to defend himself
 17 or respond to these allegations if you omitted certain
 18 details from Mr. Rapp's account?

19 19 MR. JASSY: Objection. Lacks foundation.
 20 Argumentative. Calls for speculation.

21 21 And to the extent that it seeks unpublished
 22 information, object on the basis of the reporter's
 23 shield and the reporter's privilege. Instruct the
 24 witness not to answer. Otherwise, he may do so.

25 25 THE WITNESS: On the advice of my attorney, I'm
 26 00148
 27 1 not answering that question.

16. Page 149, Lines 8 to 19

8 Q. Okay. So you were letting Mr. Rapp know that
 9 you had reached out to Mr. Fowler's team that Saturday;
 10 right?

11 MR. JASSY: Objection. Best Evidence Rule.
 12 And it misstates prior testimony. And it's misleading.
 13 And to the extent that it calls for the
 14 disclosure of unpublished information. Instruct the
 15 witness not to answer on the grounds of the reporter's
 16 privilege and the reporter's shield. Otherwise, he may
 17 do so.

18 THE WITNESS: On the advice of my attorney, I'm
 19 not answering that question.

17. Page 157, Line 13 to Page 158, Line 12

13 My question to you, to be very specifically --
 14 excuse me -- very specific, is, Was it or was it not
 15 important to you in October 2017 that you accurately
 16 conveyed to Mr. Spacey's team the allegations as
 17 Mr. Rapp told them to you?

18 A. On the advice of my --

19 MR. JASSY: Hang on.

20 Objection. Asked and answered. Same
 21 objection. Same instructions as the last two questions.

22 THE WITNESS: On advice of my attorney, I'm not
 23 answering that question.

24 BY MR. SCOLNICK:

25 Q. Did you accurately convey the content of the
 00158

22 allegations that Mr. Rapp provided to you?

23 MR. JASSY: Objection. Vague.

24 MR. SAGHIR: Objection.

25 MR. JASSY: To the extent that it calls for the
 26 disclosure of information protected from disclosure by
 27 the reporter's shield and the reporter's privilege,
 28 instruct the witness not to answer. Otherwise, he can
 8 answer the question.

9 MR. SAGHIR: Join. Objection. Vague.

10 Overbroad.

11 THE WITNESS: On the advice of my attorney, I'm
 12 not answering the question.

18. Page 159, Line 9 to Page 160, Line 23?

9 So here's my question. Did you believe that in
 10 this e-mail that's on our screen at the bottom of
 11 Exhibit 112 that it was important to accurately convey
 12 Mr. Rapp's allegations as he told them to you, to
 13 Mr. Fowler's team?

14 MR. JASSY: Asked and answered I think for the
 15 fifth time. And to the extent it calls for the
 16 disclosure of unpublished information, I -- or is asking
 17 for -- or hinting at that there is unpublished
 18 information that you're trying to get at, also lacks
 19 foundation.

20 I instruct the witness not to answer on the
 21 basis of the reporter's privilege and the reporter's
 22 shield. Otherwise, he can answer the question.

23 THE WITNESS: On advice of my attorney, I'm not
 24 answering that question.

25 ///

00160

1 BY MR. SCOLNICK:

2 Q. Okay. So let's look at the text of the e-mail.

3 Is it big enough for you to see?

4 A. Yes.

5 Q. Okay. You said, starting the second sentence,
 6 "The facts in this story are based on primary accounts
 7 from Anthony Rapp, but we wanted to take this step to
 8 ensure that there is no confusion about what we plan to
 9 publish to give you a fair opportunity to correct any
 10 perceived errors or otherwise respond to our reporting."

11 Did I read that correctly?

12 A. Yes.

13 Q. This was the same day that this article would
 14 be published; right?

15 A. According to the time stamp, yes, it was.

16 Q. And it was also several weeks after Mr. Rapp
 17 first approached you with his allegations; right?

18 A. Three weeks later, yes.

19 Q. It was after you had the opportunity to prepare
 20 a first draft; right?

21 A. Yes.

22 Q. Is that a yes?

23 A. Yes. Correct.

19. Page 164, Lines 6 to 16

6 Q. Why didn't you reach out earlier to
7 Mr. Fowler's team to ask for a response? What I mean by
8 "earlier" is before October 28th.

9 MR. JASSY: Objection. Lacks foundation. And
10 to the extent it calls for the disclosure of unpublished
11 information, object based on the reporter's privilege
12 and reporter's shield.

13 Instruct the witness not to answer. Otherwise,
14 he may do so.

15 THE WITNESS: On the advice of my counsel, I'm
16 not responding to that question.

10 20. Page 166, Lines 13 to 25

12 Q. Was it your choice to contact Mr. Fowler's team
13 and include the details of Mr. Rapp's allegations for
14 the first time on the day the article was to be
15 published?

16 MR. JASSY: Objection. Lacks foundation.
17 Misstates prior testimony. And to the extent it calls
18 for the disclosure of unpublished information, I object
19 on the basis of the reporter's shield and the reporter's
20 privilege.

21 Instruct the witness not to answer. Otherwise,
22 he may do so.

23 THE WITNESS: On the advice of my attorney, I'm
24 not answering that question.

21 21. Page 167, Lines 2 to 20

22 Q. Last sentence of Point 1 you said, "Rapp
23 alleges that, the best of his recollection, he has never
24 heard from nor spoken with Spacey since that night
25 besides seeing him on the set of the film of 'Six
26 Degrees of Separation' and seeing him again before the
27 1999 Tony Awards."

28 8 Did I read that correctly?

9 A. You did.

10 Q. Isn't it true that Mr. Rapp told you that he
11 last saw Mr. Fowler at the two thousand -- at the 2008

12 awards ceremony?

13 MR. JASSY: Object on the basis -- or I object
14 to the extent that it calls for disclosure of
15 unpublished information based on the reporter's
16 privilege and the reporter's shield.

17 But to the extent that Mr. Vary believes he can
18 testify on it, he may.

19 THE WITNESS: On the advice of my attorney, I
20 am not going to answer that question.

22. Page 167, Line 22 to Page 168, Line 8

22 Q. Were you concerned in this e-mail, when you
23 wrote it to Mr. Fowler's team, that you were not
24 accurately conveying what Mr. Rapp had told you?

25 MR. JASSY: Objection. Misstates prior
00168

1 testimony. Lacks foundation. And to the extent it
2 calls for the disclosure of unpublished information, I
3 object on the basis of the reporter's shield and
4 reporter's privilege.

5 Instruct the witness not to answer. Otherwise,
6 he may.

7 THE WITNESS: On the advice of my attorney, I'm
8 not answering that question.

19 23. Page 170, Lines 2 to 10

20 Q. Did you refer to your correspondence to
21 Mr. Fowler's team as a no-surprise e-mail?

22 MR. JASSY: Objection to the extent it calls
23 for the disclosure of unpublished information.

24 I instruct the witness not to answer on the
25 grounds of the reporter's privilege send the reporter's
26 shield. Otherwise, he may do so.

27 THE WITNESS: On the advice of my attorney, I
28 am not responding to that question.

27 24. Page 171, Line 20 to Page 172, Line 5

20 Q. If a no-surprise e-mail is, as you said, good

1 21 journalism, then why did you not send a no-surprise
2 22 e-mail before October 29, 2017?

2 23 MR. JASSY: Objection. Lacks foundation.
3 24 To the extent that it calls for disclosure of
4 25 unpublished information based on the reporter's shield
00172

5 1 and the reporter's privilege, I instruct the witness not
6 2 to answer. Otherwise, he may answer the question.

6 3 MR. SAGHIR: Join.

7 4 THE WITNESS: On advice of my attorney, I'm not
8 5 answering that question.

9
10 25. Page 173, Line 24 to Page 174, Line 18

11 24 Q. Mr. Vary, you learned the identity of
12 25 Mr. Rapp's friend from Joliet before this article
00174

13 1 published; right?

14 2 MR. JASSY: To the extent it calls for the
15 3 disclosure of unpublished information, instruct the
16 4 witness not to answer based on the reporter's privilege
17 5 and the reporter's shield. Otherwise, he may do so.

18 6 THE WITNESS: On the advice of my attorney, I'm
19 7 not answering that question.

20 8 BY MR. SCOLNICK:

21 9 Q. Mr. Rapp told you before you published this
22 10 article that his friend from Joliet was a man named John
23 11 Barrowman; right?

24 12 MR. JASSY: Objection.

25 13 To the extent it calls for the disclosure of
26 14 unpublished information, instruct the witness not to
27 15 answer on the grounds of the reporter's privilege and
28 16 the reporter's shield. Otherwise, he may do so.

29 17 THE WITNESS: On the advice of my attorney, I
30 18 am declining to answer that question.

25
26 26. Page 177, Line 7 to Page 178, Line 21

27 7 Q. Have you ever tried Googling Mr. Barrowman to
28 8 determine his birthday?

29 9 MR. JASSY: Objection.

30 10 To the extent it calls for the disclosure of

11 unpublished information protected from disclosure by
 12 the -- and news-gathering information protected from
 13 disclosure by the reporter's shield and reporter's
 14 privilege, I instruct the witness not to answer.
 15 Otherwise, he may do so.

16 THE WITNESS: I -- on the advice of my
 17 attorney, I decline to answer.

18 BY MR. SCOLNICK:

19 Q. Mr. Rapp, if you knew that John Barrowman was
 20 actually a 19-year-old man in 1986, would you have
 21 included these details claiming that he was a
 22 17-year-old boy in your story?

23 MR. JASSY: Objection. Lacks foundation.
 24 Misstates prior testimony. Best Evidence Rule.

25 To the extent it calls for -- and

00178

1 argumentative.

2 To the extent it calls for disclosure of
 3 unpublished information, instruct the witness not to
 4 answer on the basis of reporter's privilege and the
 5 reporter's shield. Otherwise, he may do so.

6 THE WITNESS: On the advice of my attorney, I
 7 decline to answer.

8 BY MR. SCOLNICK:

9 Q. Do you think it's important -- how about this.
 10 Did you think in 2017 that it was important that you get
 11 the age of Mr. Rapp's friend, as you referred to in the
 12 story, correct before going to print?

13 MR. JASSY: Objection.

14 To the extent it calls for the disclosure of
 15 unpublished information protected from the disclosure by
 16 the reporter's shield and reporter's privilege, instruct
 17 the witness not to answer. Otherwise, he may do so.

18 And I'll also object that it lacks foundation
 19 and it's argumentative.

20 THE WITNESS: On the advice of my attorney, I
 21 decline to answer.

25
 26 27. Page 179, Lines 13 to 20

27
 28 13 Q. Okay. So, Mr. Vary, if you knew that John
 Barrowman was actually 19 -- a 19-year-old man in 1986,
 would you have included the details in your story that

16 he was only a 17-year-old boy?

17 MR. JASSY: Same objections and same
18 instructions as the last question.

19 THE WITNESS: On advice of my attorney, I am
20 declining to answer that question.

28. Page 180, Line 8 to Page 181, Line 16

8 Q. Has anyone told you, after publishing this
9 article, that Mr. Barrowman was actually 19 years old in
10 1986?

11 MR. JASSY: Objection.

12 To the extent it calls for disclosure of
13 unpublished information, instruct the witness not to
14 answer on the grounds of reporter's privilege and the
15 reporter's shield. Otherwise, he may do so.

16 THE WITNESS: On the advice of my attorney, I
17 am declining to answer that question.

18 MR. JASSY: I assume you mean other than you,
19 Chase, in your representations in this deposition;
20 right?

21 MR. SCOLNICK: Thank you. Yes.

22 BY MR. SCOLNICK:

23 Q. Other than me today, has anyone told you, after
24 publishing this article -- or at any time that
25 Mr. Barrowman was actually a 19-year-old man in 1986?

00181

1 MR. JASSY: Same objection. Same instruction.

2 THE WITNESS: On the advice of my attorney, I'm
3 declining to answer that question.

4 BY MR. SCOLNICK:

5 Q. If you would have known at the time of
6 publishing this article that Mr. Barrowman was a
7 19-year-old man and not a 17-year-old boy, would you
8 still have published the details as you did and included
9 in the story?

10 MR. JASSY: Objection. Calls for speculation.

11 Lacks foundation.

12 To the extent that it calls for the disclosure
13 of unpublished information, instruct the witness not to
14 answer. Otherwise, he may do so.

15 THE WITNESS: Advice of my attorney, I'm
16 declining to answer this question.

1 29. Page 182, Line 14 to Page 184, Line 1

2 14 Q. In the approximately three weeks between
 3 15 Mr. Rapp first telling you his story and you publishing
 4 16 it, what, if any, attempts did you make to reach out to
 5 17 Mr. Barrowman and ask him to corroborate or contradict
 6 18 Mr. Rapp's account?

7 19 MR. JASSY: Objection.

8 20 To the extent it calls for the disclosure of
 9 21 unpublished information, instruct the witness not to
 10 22 answer on the basis of the reporter's privilege and the
 11 23 reporter's shield. Otherwise, he may answer.

12 24 THE WITNESS: The advice of my attorney, I'm
 13 25 declining to answer that question.

14 00183

15 1 BY MR. SCOLNICK:

16 2 Q. Did you think Mr. Fowler deserved, before you
 17 3 publishing this story, in that three-week period of
 18 4 time, that you go out and attempt to verify what
 19 5 Mr. Rapp was telling you by contacting a percipient
 20 6 witness from 1986?

21 7 MR. JASSY: Objection. Lacks foundation.

22 8 Argumentative.

23 9 To the extent it calls for the disclosure of
 24 10 unpublished information, instruct the witness not to
 25 11 answer on the grounds of the reporter's privilege and
 12 the reporter's shield. Otherwise, he may answer.

13 13 THE WITNESS: On the advice of my attorney, I
 14 14 am declining to answer that question.

15 15 BY MR. SCOLNICK:

16 16 Q. What, if any, attempts did you make to
 17 17 interview Mr. Barrowman before you published this story
 18 18 with Mr. Rapp's allegations?

19 19 MR. JASSY: Objection. Asked and answered. To
 20 20 the extent it calls for disclosure of unpublished
 21 21 information protected from disclosure by the attorney --
 22 22 excuse me -- by the reporter's shield or the reporter's
 23 23 privilege, I instruct the witness not to answer.

24 24 Otherwise, he may answer.

25 25 THE WITNESS: On the advice of my attorney, I'm
 26 00184

27 1 declining to answer that question.

28

1 30. Page 184, Line 17 to Page 185, Line 13

2 17 Has anyone informed you that Mr. Barrowman has
3 18 been deposed in this case?

4 19 MR. JASSY: Objection.

5 20 To the extent it calls for disclosure of
6 21 attorney-client privileged communications, I instruct
7 22 the witness not to answer.

8 23 THE WITNESS: On the advice of my attorney, I'm
9 24 not responding to that question.

10 25 ///

11 00185

12 1 BY MR. SCOLNICK:

13 2 Q. Has anyone informed you that Mr. Barrowman
14 3 denies sitting in a VIP area with Mr. Rapp and
15 4 Mr. Fowler at the Limelight in 1986?

16 5 MR. JASSY: Objection.

17 6 To the extent it calls for the disclosure of
18 7 attorney-client privileged communications or unpublished
19 8 information obtained in the course of news-gathering,
20 9 instruct the witness not to answer on the grounds of the
21 10 reporter's privilege and the reporter's shield.

22 11 Otherwise, he can answer.

23 12 THE WITNESS: On the advice of my attorney, I'm
24 13 declining to answer that question.

18 31. Page 188, Lines 7 to 16

19 7 Q. Did Mr. Rapp tell you that he had been to
20 8 Mr. Fowler's apartment more than once?

21 9 MR. JASSY: Objection.

22 10 To the extent it calls for disclosure of
23 11 unpublished information, I object based on the
24 12 attorney -- excuse me -- the -- the reporter's privilege
25 13 and the reporter's shield and instruct with the witness
26 14 not to answer. Otherwise, he may.

27 15 THE WITNESS: On the advice of my attorney, I'm
28 16 not responding to that question.

32. Page 188, Line 25 to Page 189, Line 9

25 Q. Did Mr. Rapp tell you that he and John

1 00189

2 Barrowman and Mr. Fowler went back to Mr. Fowler's
3 studio apartment after the Limelight?

4 MR. JASSY: Objection.

5 To the extent it calls for the disclosure of
6 unpublished information, instruct the witness not to
7 answer based on the reporter's privilege and the
reporter's shield. And otherwise, he may do so.8 THE WITNESS: On the advice of my attorney, I'm
9 not responding to that question.8
9 33. Page 199, Line 20 to Page 200, Line 710 20 Q. What about getting a floor plan of the
11 apartment? Is that something you're able to do in -- in
12 2017, when you were told by Mr. Rapp that Mr. Fowler's
13 apartment had a bedroom?14 24 MR. JASSY: Objection. Calls for speculation.
25 Lacks foundation. And to the extent that it calls for

00200

1 the disclosure of -- of unpublished information or
2 news-gathering information, object on the reporter's
3 privilege and the reporter's shield.4 Instruct the witness not to answer. But he
5 may, if he's able to.6 THE WITNESS: On the advice of my attorney, I
7 am declining to respond to that question.20
21 34. Page 200, Line 22 to Page 201, Line 1022 22 Q. I think to clarify that last question, let me
23 ask it again.24 24 If you would have known in October of 2017 that
25 Mr. Fowler's apartment in 1986 did not -- did not have a
00201

25 1 bedroom, would you have still published this story?

26 2 MR. JASSY: Objection. Calls for speculation.

27 3 Incomplete hypothetical. Lacks foundation. And to the
4 extent that it calls for disclosure of unpublished
5 information, I object on the basis of a reporter's
6 privilege and the reporter's shield.

28 7 Instruct the witness not to answer. Otherwise,

1 8 he may answer the question.

2 9 THE WITNESS: On the advice of my attorney, I'm
3 10 declining to respond to that question.

4 35. Page 202, Lines 11 to 20

5 11 Q. Did Mr. Rapp identify any witnesses who could
6 12 put him at this alleged party at Mr. Fowler's apartment?

7 13 MR. JASSY: Objection.

8 14 To the extent it calls for the disclosure of
9 15 unpublished information, I object on the basis of the
10 16 reporter's privilege and the reporter's shield and
11 17 instruct the witness not to answer. But you may
12 18 otherwise answer the question.

13 19 THE WITNESS: On the advice of my attorney, I'm
14 20 not responding to that question.

15 36. Page 203, Lines 9 to 19

16 9 Q. Did Mr. Rapp provide the description of any
17 10 witness who allegedly saw him at a party at Mr. Fowler's
18 11 apartment?

19 12 MR. JASSY: Objection. To the extent it calls
20 13 for the disclosure of unpublished information, object
21 14 based on the reporter's privilege and the reporter's
22 15 shield.

23 16 Instruct the witness not to answer. Otherwise,
24 17 he may answer the question.

25 18 THE WITNESS: On the advice of my attorney, I'm
26 19 not responding to that question.

27 37. Page 204, Line 22 to Page 205, Line 6

28 22 Q. And what details did she provide about
29 23 Mr. Rapp's account that he allegedly told her in 1992?

30 24 MR. JASSY: Objection.

31 25 To the extent it calls for the disclosure of
32 00205

33 1 unpublished information, I instruct the witness not to
34 2 answer on the basis of the reporter's privilege and the
35 3 reporter's shield. Otherwise, he may answer the

1 4 question.

2 5 THE WITNESS: On advice of my attorney, I'm not
3 6 responding to that question.

4 38. Page 205, Line 19 to Page 206, Line 19

5 19 Q. Did you interview any witnesses who saw
6 20 Mr. Rapp interact with Mr. Fowler in 1986?

7 21 MR. JASSY: Objection.

8 22 To the extent it calls for the disclosure of
9 23 unpublished information, instruct the witness not to
10 24 answer on the basis for the reporter's privilege and the
11 25 reporter's shield. Otherwise, he may answer the

00206

1 1 question.

2 2 THE WITNESS: On the advice of my attorney, I'm
3 3 declining to respond to that question.

4 4 BY MR. SCOLNICK:

5 5 Q. Did you interview anyone who -- to whom
6 6 Mr. Rapp told his allegations at around the time of --
7 7 well, in the -- in 1986 or 1987 -- strike that. I can
8 8 ask the question a little bit cleaner.

9 9 Did you interview anyone who confirmed to you
10 10 that Mr. Rapp shared with them his allegations against
11 11 Mr. Fowler at or around the time that the allegations
12 12 allegedly occurred?

13 13 MR. JASSY: Objection. Vague.

14 14 To the extent that it calls for the disclosure
15 15 of information protected by the reporter's shield and
16 16 the reporter's privilege, I instruct the witness not to
17 17 answer. Otherwise, he may do so.

18 18 THE WITNESS: On the advice of my attorney, I'm
19 19 declining to respond to that question.

24 39. Page 207, Line 20 to Page 208, Line 4

25 20 Q. Did Mr. Rapp tell you what details Anthony
26 21 provided at this party?

27 22 MR. JASSY: Objection.

28 23 To the extent it calls for the disclosure of
29 24 unpublished information, instruct the witness not to
25 25 answer on the basis of the reporter's privilege and the

1 00208

2 reporter's shield. Otherwise, he may answer the
3 question.

4 THE WITNESS: On the advice of my attorney, I'm
5 declining to respond to that question.

6 40. Page 209, Lines 11 to 21

7 11 Q. Well, Mr. Rapp's telling you here in writing
8 that it was John Barrowman that went to the Limelight
9 with Mr. Fowler and Mr. Rapp; right?

10 14 MR. JASSY: Objection.

11 15 To the extent that it's asking for the
12 disclosure of unpublished information protected from
13 disclosure by the reporter's shield and reporter's
14 privilege, instruct the witness not to answer.

15 19 Otherwise, he can answer the question.

16 20 THE WITNESS: On the advice of my attorney, I'm
17 not responding to that question.

18 41. Page 210, Lines 11 to 21

19 11 Q. Mr. Vary, did Mr. Rapp ever tell you that you
20 shouldn't share the details of what he told you about
21 his interactions with Mr. Fowler and Mr. Barrowman?

22 14 MR. JASSY: Objection. Lacks foundation. And
23 to the extent it calls for the disclosure of unpublished
24 information, object on the basis of the reporter's
25 shield and the reporter's privilege.

26 18 Instruct the witness not to answer, unless he's
27 otherwise able to do so.

28 20 THE WITNESS: On the advice of my attorney, I
29 am declining to respond to that question.

30 42. Page 213, Lines 4 to 14

31 4 Q. At no point did Mr. Rapp tell you he had
32 trouble remembering the details of his allegations, did
33 he?

34 7 MR. JASSY: Objection. Lacks foundation.

35 8 And to the extent it's asking for unpublished

9 information -- I'm not sure that it is; but if it is, I
 10 instruct the witness not to answer on the basis of the
 11 reporter's shield and reporter's privilege. But
 12 otherwise, he can answer the question, if he's able.

13 THE WITNESS: No. On the advice of my
 14 attorney, I am declining to respond to that question.

43. Page 213, Line 16 to Page 215, Line 2

16 Q. Looking at the top of Page 46. I asked you
 17 earlier about Mr. Rapp's statement, "He didn't tell the
 18 rest of the story, though." When I asked you what you
 19 meant by that, you said the rest of the story that
 20 appears in the article. So I'm trying to figure out
 21 here what you believe Mr. Barrowman knew about the rest
 22 of -- I'm sorry. Strike that.

12 I'm trying to figure out what you believe
 13 Mr. Barrowman knew beyond what appears in the -- in the
 14 -- in the prior sentence, which is that Mr. Barrowman
 00214

1 went to the Limelight with Mr. Rapp and Mr. Fowler.

2 What beyond that was the rest of the story?

3 MR. JASSY: Objection. Compound. And
 4 misleading. Misstates prior testimony. Lacks
 5 foundation. And to the extent it calls for the
 6 disclosure of unpublished information, I object on the
 7 basis of the reporter's shield and reporter's privilege.

8 Instruct the witness not to answer. Otherwise,
 9 he may do so.

10 THE WITNESS: On the advice of my attorney, I'm
 11 declining to respond to that question.

12 BY MR. SCOLNICK:

13 Q. Let me ask the question more cleanly.

14 What else did Mr. Rapp tell you about his
 15 interactions with Mr. Barrowman and Mr. Fowler?

16 MR. JASSY: Objection. Lacks foundation. And
 17 to the extent that it calls for the disclosure of
 18 unpublished information, which I think it does, the
 19 objection is based on the reporter's shield, the
 20 reporter's privilege.

21 And I instruct the witness not to answer,
 22 unless he's otherwise able.

23 MR. SAGHIR: Objection. No foundation.

1 24 MR. JASSY: Sorry. I thought I said that one
 2 25 too. I join in that.
 00215

3 1 THE WITNESS: On the advice of my attorney, I'm
 4 2 declining to respond to that question.
 5

6 44. Page 217, Line 11 to Page 221, Line 12
 7

8 11 Q. What are the details about the party that you
 9 12 steered away from in your article?
 10

11 13 MR. SAGHIR: Objection. Assumes facts not in
 12 14 evidence. Argumentative. No foundation.
 13

14 15 MR. JASSY: Join in all those objections.
 15

16 16 And to the extent that it calls for the
 17 17 disclosure of unpublished information, instruct the
 18 18 witness not to answer on the basis of the reporter's
 19 19 shield and the reporter's privilege. And -- otherwise,
 20 20 he's free to answer the question.
 21

22 21 THE WITNESS: On the basis on the advice of my
 23 22 attorney, I'm -- I'm electing not to respond to that
 24 23 question. I will, I believe, refer to earlier testimony
 25 24 I gave in which I indicated that Anthony's best
 00218 25 recollection -- you know, what -- what -- what Anthony
 17

18 1 told me about the party is what is published.
 19

20 2 BY MR. SCOLNICK:
 21

22 3 Q. Are you willing to tell me any details about
 23 4 what Mr. Rapp told you about his version of events
 24 5 outside of what you published in your -- in your
 25 6 story -- in your article?
 26

27 7 MR. SAGHIR: Objection. No foundation.
 28

1 8 MR. JASSY: Join in that objection.
 2

3 9 THE WITNESS: I would just reiterate the
 4 10 objections that my attorney's been making as far as the
 5 11 reporter's shield law. I am here to talk about what was
 6 12 published in the story.
 7

8 13 BY MR. SCOLNICK:
 9

10 14 Q. So is that -- I just want to make sure the
 11 15 record's clear. Are you refusing to answer based on
 12 16 your attorney's objection for the reporter's shield law
 13 17 statements that Mr. Rapp has made to you that were
 14 18 unpublished?
 15

16 19 MR. SAGHIR: Objection. Lacks foundation.
 17

1 20 MR. JASSY: It lacks foundation. And I think I
2 21 know what you're getting at -- but the -- I'm still
3 22 going to raise the objection that it call -- to the
4 23 extent that it calls for the disclosure of unpublished
5 24 information, I would instruct the witness not to answer
6 25 on the basis of the shield and the privilege --
00219

7 1 reporter's shield and reporter's privilege. Otherwise,
8 2 he can answer the question.

9 3 THE WITNESS: I am following the best advice of
10 4 my attorney to decline to respond to questions about
11 5 unpublished material.

12 6 BY MR. SCOLNICK:

13 7 Q. Okay. Did you make an audio recording of any
14 8 of your interviews with Mr. Rapp?

15 9 MR. JASSY: Objection.

16 10 To the extent that it calls for the disclosure
17 11 of news-gathering techniques protected from disclosure
18 12 by the reporter's privilege and the reporter's shield, I
19 13 instruct the witness not to answer on the grounds -- the
20 14 reporter's privilege and reporter's shield. Otherwise,
21 15 if he can answer the question, he may.

22 16 THE WITNESS: In the best advice of my
23 17 attorney, I'm declining to respond to that question.

24 18 BY MR. SCOLNICK:

25 19 Q. Did you take notes during any of your
26 20 interviews with Mr. Rapp?

27 21 MR. JASSY: Objection.

28 22 To the extent that it calls for the disclosure
29 23 of news-gathering information that's unpublished, which
30 24 it does, instruct the witness not to answer on the basis
31 25 of the reporter's shield and reporter's privilege.
00220

32 1 Otherwise, he can answer the question.

33 2 THE WITNESS: The advice of my attorney, I'm
34 3 declining to respond to that question.

35 4 BY MR. SCOLNICK:

36 5 Q. Did Mr. Rapp tell you how many people were at
37 6 the party -- the alleged party at Mr. Fowler's house?

38 7 MR. JASSY: Objection.

39 8 To the extent calls for the disclosure
40 9 unpublished information, instruct the witness not to
41 10 answer on the basis of the reporter's shield and the
42 11 reporter's privilege. Otherwise, he can answer the

12 question.

13 THE WITNESS: On the advice of my attorney, I'm
14 declining to respond to that question.

15 BY MR. SCOLNICK:

16 Q. Did Mr. Rapp refer to the event that allegedly
17 occurred at Mr. Fowler's house as a gathering or a party
18 or some other word?

19 MR. JASSY: Objection.

20 To the extent it calls for disclosure of
21 unpublished information, I instruct the witness not to
22 answer on the grounds of the reporter's privilege and
23 the reporter's shield. Otherwise, he can answer the
24 question.

25 THE WITNESS: On the advice of my attorney, I'm
00221

1 declining to respond to that question.

2 BY MR. SCOLNICK:

3 Q. Did Mr. Rapp tell you whether Mr. Fowler had a
4 dog at his apartment?

5 MR. JASSY: Objection. Calls for the
6 disclosure -- to the extent that it calls for the
7 disclosure of unpublished information, instruct the
8 witness not to answer on the basis of the reporter's
9 shield and the reporter's privilege. Otherwise, he can
10 answer the question.

11 THE WITNESS: On the advice of my attorney, I'm
12 declining to respond to that question.

19
20 45. Page 228, Line 24 to Page 229, Line 13

21 24 Q. Did you speak with Mr. Dawes, or did someone
22 else on your team?

00229

23 1 MR. JASSY: To the extent it calls for the
2 disclosure of news-gathering information that's not
3 published, instruct the witness not to answer on the
4 grounds of the reporter's shield and the reporter's
5 privilege. Otherwise, he can answer the question.

26 6 THE WITNESS: This is not a section of the
27 7 article that I authored.

28 8 BY MR. SCOLNICK:

9 Q. To your recollection, have you ever
10 communicated with Mr. Dawes?

11 MR. JASSY: Objection. Same instruction.
12 THE WITNESS: On the advice of my attorney, I'm
13 not responding to that question.
3

46. Page 230, Line 17 to Page 231, Line 1

17 Q. What, if any, investigation did you conduct
18 regarding Mr. Dawes's allegations against Mr. Fowler?
19 MR. JASSY: Objection. Asked and answered.

20 And to the extent that it calls for the
21 disclosure of information protected from disclosure by
22 the reporter's shield and the reporter's privilege,
23 instruct the witness not to answer. But otherwise, he
24 may.

25 THE WITNESS: On the advice of my attorney, I'm
00231

12 declining to respond to that question.
13

47. Page 275, Line 14 to Page 276, Line 17

14 Q. Why did you not inform your readers that you
15 informed Mr. Fowler's camp for the first time of the
16 nature of the allegations and identity of the accuser
17 just hours before the article was published?

18 MR. JASSY: Objection. Lacks foundation.
19 And to the extent it calls for the disclosure
20 of news-gathering information or unpublished information
21 that is protected from disclosure by the reporter's
22 privilege or the reporter's shield, I instruct the
23 witness not to answer. But otherwise, he can do so, if
24 he's able.

25 THE WITNESS: On the advice of my attorney, I
00276

24 1 am not responding to that question.
2 BY MR. SCOLNICK:

25 3 Q. Did you think it was important for the public
4 to know that you reached out to Mr. Fowler's camp and
5 informed them of the allegations and the identity of the
6 accuser hours before the story was published?
7 MR. JASSY: Objection.

8 To the extent that it calls for the disclosure
9 of information that is protected from disclosure by the

10 reporter's privilege, Reporter's shield, instruct the
 11 witness not to answer. Otherwise, he can do so.
 12 And I also object that it lacks foundation.
 13 MR. SAGHIR: Join in the objection as to no
 14 foundation.
 15 THE WITNESS: Based on my best -- based on
 16 advice of my attorney, I am declining to respond to that
 17 question.

7 **B. Moving Party Mr. Fowler's Statement**

8 Mr. Vary's counsel's deposition objections and instructions not to answer were
 9 made on two primary grounds. First, Mr. Vary objected that the subject of the questions
 10 was protected under a qualified "reporter's privilege" under the First Amendment.
 11 Second, Mr. Vary objected that California's "reporter's shield" provided protection that
 12 justified his refusal to provide this discovery. These objections have no merit.

13 The Court can and should find Mr. Vary to be in contempt and issue appropriate
 14 sanctions unless Mr. Vary provides a complete production of documents and sits for a
 15 supplemental deposition within five (5) business days of the Court's order on this motion
 16 to answer the questions he refused to answer at the first session of his deposition plus all
 17 reasonable follow-up questions. *See, e.g.*, Fed. R. Civ. P. 45(g) (stating district court
 18 "where compliance is required . . . may hold in contempt a person who, having been
 19 served, fails without adequate excuse to obey [a] subpoena or an order related to it").

20 **1. Mr. Vary's Objections Based On Qualified Protection Under
 21 the First Amendment Are Without Merit**

22 Mr. Vary first argues the First Amendment provides qualified protection for his
 23 "newsgathering activities." He relies on the Ninth Circuit's opinion in *Shoen v. Shoen*,
 24 5 F.3d 1289 (9th Cir. 1993) for his broad assertion that First Amendment justifies his
 25 blanket objection under these circumstances.

26 As an initial matter, Mr. Vary has failed to demonstrate the questions he refused
 27 to answer concern his protected newsgathering. While Mr. Vary wrote an article on
 28 Rapp's allegations against Mr. Fowler in October 2017 and a follow-up article a year

1 later in 2018, Mr. Vary has known Rapp for over two decades. Mr. Vary acknowledges
 2 he and Rapp are friends and remain friends. *See* Scolnick Decl., Ex. 1 (Vary Depo. RT
 3 at 58:21-25, 60:17-18, 66:3-7). Mr. Vary cannot use a qualified privilege under the First
 4 Amendment to broadly protect all of his communications with Rapp other than what he
 5 explicitly included in his two articles.

6 Further, the First Amendment protection – even when broadly interpreted – applies
 7 to a reporter’s “source materials.” *Schoen*, 5 F.3d at 1295. Here, Mr. Vary refused to
 8 answer many questions at deposition about his own thought processes and actions in
 9 preparing articles about Rapp’s allegations against Mr. Fowler. *See, e.g., Dillon v. City*
 10 *and County of San Francisco*, 748 F.Supp. 722, 726 (N. D. Cal. 1990) (finding non-party
 11 could be compelled to testify about personal observations). Such information is relevant
 12 and important because Rapp likely will attempt to present evidence at trial about the
 13 Buzzfeed article that contains the allegations upon which his claims are based. Rapp
 14 likely will attempt to claim the account contained in the Buzzfeed article is consistent
 15 with that given at his deposition and at trial. But the evidence suggests Rapp made
 16 various statements to Mr. Vary inconsistent with the version of events about which he
 17 testified at deposition.

18 Throughout discovery, Rapp also has mischaracterized Mr. Fowler’s response to
 19 Mr. Vary’s request for comment on his Buzzfeed article. Mr. Vary’s text exchanges with
 20 Rapp demonstrate Mr. Vary concealed material inconsistencies in Rapp’s account and
 21 misrepresented material facts when seeking Mr. Fowler’s comment. By his own
 22 admission in text exchanges with Rapp, Mr. Vary changed Rapp’s account to deprive
 23 Mr. Fowler of a fair and adequate opportunity to respond to the demonstrably false details
 24 of Rapp’s account. Evidence of Mr. Vary’s attempt to deceive Mr. Fowler and deprive
 25 him of an opportunity to comment on the story—all in concert with Rapp—is essential
 26 to Mr. Fowler’s defense and beyond the scope of legitimate journalistic activity protected
 27 by the First Amendment.

28

1 Further, Mr. Vary has not and cannot show he did not affirmatively waive the
 2 protection he now asserts. Importantly, some of the unpublished communications
 3 between Mr. Vary and Rapp – or at least some of their text message communicated –
 4 previously were produced in this case by Rapp, with Mr. Vary’s knowledge and implicit
 5 consent. More specifically, Mr. Vary testified he was informed by Rapp’s lawyers in
 6 early 2021 that Rapp intended to produce various text messages between Rapp and Mr.
 7 Vary, including back-and-forth between them leading to the finalization and publication
 8 of Mr. Vary’s Buzzfeed article. *See* Scolnick Decl., Ex. 1 (Vary Depo. Tr.) at 12:19-
 9 13:7, 14:24-15:4, 28:16-23.) Mr. Vary was told those communications would be
 10 produced, and he interjected no objection at that time. To the extent he had any valid
 11 objection, he waived it by not taking action at that time, knowing that unpublished
 12 materials would be disclosed. *See, e.g., United States v. Bahe*, 128 F.3d 1440, 1442 (10th
 13 Cir. 1997). But, at his deposition, Mr. Vary refused to answer any question about his
 14 unpublished communications with Rapp.

15 The produced text messages suggested there were glaring inconsistencies with the
 16 story Rapp initially told Mr. Vary with what ultimately was published in the Buzzfeed
 17 article. For example, Rapp stated in the text message he last saw Mr. Fowler in 2008 at
 18 the Tony Awards, but that was proven to be impossible. *See, e.g., Scolnick Decl., Ex. 1*
 19 (Vary Depo RT) at 119:15-122:7. But this inconsistency was corrected in Mr. Vary’s
 20 published story with no acknowledgement or disclosure in the article that Rapp had stated
 21 it incorrectly. *Id.* at 167:2-20. Likewise, the text messages produced by Rapp show he
 22 disclosed his visiting friend during the time of the alleged incident was an actor named
 23 John Barrowman. Although Barrowman’s age is easily verifiable and reveals he was 19
 24 years old at the time of the alleged incident, Mr. Vary’s story makes the demonstrably
 25 false claim that Rapp’s unnamed friend was a “17 year-old boy” in 1986. But Mr. Vary
 26 refused to answer questions about this. *Id.* at 174:9-18, 177:7-181:16.

27 Besides lacking justification to withhold even the “source materials” contemplated
 28 by the protection, the jury also must be permitted to understand the circumstances of how

1 it was prepared and published – *e.g.*, the extent of Mr. Vary’s investigation, the degree
 2 to which the article’s content adequately conveyed his understanding, and his personal
 3 biases. Without that context, the jury will be misled and confused about the veracity of
 4 the Buzzfeed article’s assertions and could mistakenly believe it was thoroughly
 5 investigated or prepared in good faith.

6 Even if the First Amendment could be properly invoked and has not been waived,
 7 the protection is qualified, not absolute. The First Amendment protection must be set
 8 aside, and discovery must be allowed, where the requested material is “(1) unavailable
 9 despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3)
 10 clearly relevant to an important issue in the case.” *See Mark v. Shoen*, 48 F.3d 412, 416
 11 (9th Cir. 1995).

12 These factors are present here. Mr. Fowler already deposed Rapp, including about
 13 his conversations with Mr. Vary. Rapp claimed he withheld no details he had with Mr.
 14 Vary but Rapp could not recall specifics of each discussion he had with Vary. *See, e.g.*,
 15 Scolnick Decl., Ex. 8 (Rapp Depo. RT at 9:5-10:7, 260:18-263:22, 269:13-270:7). Nor
 16 did Rapp provide any specific details in his following interrogatory responses. *Id.*, Ex.
 17 9 (Excerpts from Rapp’s 8/9/21 Interrogatory Responses). More specifically, Rapp
 18 stated he did “not recall the exact words [he] used” in discussing his allegations with Mr.
 19 Vary. *Id.* He stated he provided “additional details of the abuse” but was “unable to
 20 state with certainty what more details [he] provided.” *Id.* But text messages produced
 21 by Rapp and other documents show that Rapp told Mr. Vary a series of inconsistent
 22 details, including the alleged date of his last time seeing Mr. Fowler, his assertion that
 23 the incident occurred in a nonexistent bedroom in Mr. Fowler’s apartment, and the age
 24 of Mr. Rapp’s friend who had accompanied him at a club with Mr. Fowler a few days
 25 before the alleged incident. The evidence of Rapp’s statements to Mr. Vary in the weeks
 26 before Rapp’s claims first became public cannot be obtained elsewhere. Further, Mr.
 27 Fowler clarified during the meet and confer conference that he is not seeking the
 28 disclosure of information from confidential sources, but Rapp and the others identified

1 || in Buzzfeed article) were not and are confidential sources.

2 The details of Rapp’s discussions with Mr. Vary likewise are not cumulative and
3 are clearly relevant to an important issue. Rapp’s credibility will be a critical issue at
4 trial. Rapp voluntarily sought out the *Buzzfeed* article with a friendly writer who would
5 sanitize the story by omitting inconsistent and demonstrably false details. The *Buzzfeed*
6 article publicly disclosed Rapp’s allegations for the first time, many decades after the
7 alleged incident. The widespread publicity of that *Buzzfeed* article concealed Rapp’s
8 false account. Rapp’s unpublished statements to Mr. Vary – rather the manicured and
9 incomplete end result – are critical to examining Rapp’s credibility and the veracity of
10 his claims.

2. **Mr. Vary's Objections Based on California's Reporter's Shield Law Do Not Justify His Withholding of Discovery, Nor Has He Shown California's Shield Law Applies Here.**

14 Besides the purported protections of the First Amendment under these
15 circumstances, Mr. Vary also claims that California’s “reporter’s shield” law applies to
16 this discovery dispute and provides absolute protection justifying Mr. Vary’s
17 withholding of documents and refusal to answer questions at deposition. Vary wrongly
18 presumes California law applies to this discovery dispute. Under Evidence Code section
19 501, “with respect to an element of a claim or defense as to which State law supplies the
20 rule of decision, the privilege of a witness . . . shall be determined in accordance with
21 State law.” Fed. R. Evid. 501. As an initial matter, Under Federal Rule of Civil
22 Procedure 45(f), this Court can and should transfer this discovery dispute to the Southern
23 District of New York where this action is pending. In this diversity action, New York
24 state law provides the substantive source of law for Rapp’s claims.

25 But even if the Court heard this dispute, and applied California's choice of law
26 rules, the result should be application of New York state law. Under California's
27 "governmental interest" choice of law analysis, the Court is to examine the policies
28 underlying the laws of the states involved to determine which state is more "interested"

1 in having its law applied. Here, the lawsuit is pending in New York and will be decided
 2 under New York law. The primary source of Vary's *Buzzfeed* article was Rapp, who is
 3 a New York citizen and appears to have been in New York at the time he spoke with
 4 Vary about the substance for the *Buzzfeed* article. While Mr. Vary is located in Los
 5 Angeles, *Buzzfeed* – the media outlet which published the article and is likely the owner
 6 of any unpublished materials – is based in New York City. *See, e.g.*,
 7 <https://www.buzzfeed.com/about/contact>.

8 New York's reporters' shield law was codified in New York Civil Rights Law §
 9 79-h, and represents an important public policy for the state. *See, e.g.*, *In re Beach v.*
 10 *Shanley*, 62 N.Y.2d 241, 255 (1984). If any shield law applies, it should be that of New
 11 York state.

12 New York's reporters' shield provides only qualified protection for non-
 13 confidential sources and information. The test requires a court to weigh the competing
 14 interests, similar to the First Amendment analysis above. Under New York law, the
 15 reporter's shield can be overcome where the party seeking disclosure shows the
 16 information (1) is highly material and relevant, (2) is critical or necessary to the
 17 maintenance of a party's claim, defense, or proof of an issue material thereto; and (3) is
 18 not obtainable from any alternative source. *See, e.g.*, *O'Neill v. Oakgrove Const., Inc.*,
 19 71 N.Y.2d 521, 527 (1988). Each of these factors is present here. Rapp's credibility
 20 and the details of the alleged incident lie at the heart of this case. Rapp's statements to
 21 Mr. Vary provide critical evidence bearing on the veracity of Rapp's claim, and such
 22 evidence cannot be obtained elsewhere.

23 Finally, even if the Court applied a choice of law analysis that determined
 24 California law should apply, Mr. Vary still should have to provide the required
 25 information. Under California law, the state's reporter's shield law must be balanced
 26 against a criminal defendant's constitutional right to a fair trial. *See Delaney v. Superior*
 27 *Court*, 50 Cal.3d 785, 805-806 (1990). The California reporter's shield may be set aside
 28 where the criminal defense shows there is a reasonable possibility the withheld

1 information would materially assist the defense. *Id.* at 807-813. While this is not a
 2 criminal case, similar considerations should apply because Rapp's claims are premised
 3 on his allegation that Mr. Fowler committed a crime. Rapp's claims were asserted under
 4 New York's Child Victims Act which resuscitated certain civil claims but only where
 5 the conduct at issue would constitute a "sexual offense" as defined in section 130 of New
 6 York's Penal Law. *See* N.Y. CLPR § 214-g. Rapp should not be permitted to pursue
 7 civil claims against Mr. Fowler that rely on showing a criminal offense, while Mr. Fowler
 8 is shielded from critical evidence that could undermine those claims.

9 **3. Vary's Other Objections Are Without Merit.**

10 During the meet and confer process, Mr. Vary also raised other miscellaneous
 11 objections, none of which have merit. Mr. Vary claimed the deposition subpoena was
 12 deficient because it was issued under letterhead from this Court, rather than the Southern
 13 District of New York. But Mr. Vary voluntarily appeared for deposition. If he wished
 14 to stand on any perceived defect in the subpoena, he was required to bring a motion to
 15 quash under Federal Rule of Civil Procedure 45. Mr. Vary did not move to quash or
 16 modify the subpoena and therefore waived these technical objections. *See, e.g., BNSF*
 17 *Ry. Co. v. Alere, Inc.*, 2018 U.S. Dist. LEXIS 83559, *13 (S.D. Cal. May 17, 2018)
 18 (failure to bring motion to quash waived objection based on geographic limit of
 19 subpoena). He cannot appear for deposition but then refuse to answer questions based
 20 on an alleged defect in the subpoena that commanded his testimony.

21 Likewise, Mr. Vary's counsel's various objections on foundation are absurd, as
 22 his objections often were made to the very questions that sought to elicit foundational
 23 details. Had Mr. Vary been allowed to answer, any missing foundation would have been
 24 supplied.

25 **C. Responding Party Vary's Statement:**

26 **1. Fowler's Entire Motion Is Untimely.**

27 As shown by the caption page and the first paragraph of Fowler's introductory
 28 statement above, the discovery cut-off in this case was January 18, 2022 and the trial

1 ready date is February 18, 2022. Fowler brings this untimely motion to compel against
 2 a third-party reporter after the close of discovery and mere days before the case is set to
 3 go to trial.

4 “Untimeliness is sufficient ground, standing alone, to deny a discovery
 5 motion.” *Wyles v. Sussman*, 445 F. Supp. 3d 751, 755 (C.D. Cal. 2020) (quoting *Williams*
 6 *v. Las Vegas Metro. Police Dep’t*, 2015 WL 3489553, at *1 (D. Nev. June 3, 2015)).
 7 Motions to compel filed after the close of discovery “are usually denied.” *Id.* (citing
 8 *Aardwolf Indus., LLC v. Abaco Machines USA, Inc.*, 2017 WL 10339007, at *2 (C.D.
 9 Cal. Aug. 9, 2017)). As a general rule in this District, discovery motions must be brought
 10 within “sufficient time for decision within the strictures of the District Judge’s scheduling
 11 order.” *See, e.g.*, Honorable Patricia Donahue,³ *Judge’s Procedures: 2. Discovery*
 12 *Motions*, <https://www.cacd.uscourts.gov/honorable-patricia-donahue>. The presiding
 13 District Judge in the underlying litigation orders the parties to be “ready for trial” starting
 14 on the date of the final pretrial filings, which are set for February 18, 2022. *See Anthony*
 15 *Rapp v. Kevin Spacey Fowler*, No. 20-cv-09586-LHK, Dkt. 118 (S.D.N.Y. Oct. 18, 2021)
 16 (Scheduling Order).⁴ By noticing a hearing for *after* the dispositive motion deadline and
 17 the final pretrial filing deadlines in the underlying litigation, Fowler risks interfering with
 18 the merits phase of the case. Fowler’s present motion is untimely.

19 Fowler’s lack of diligence is the source of delay here. Adam Vary, the third-party
 20 reporter, sat for an over seven-hour deposition on December 16, 2021 after being served
 21 the second of two deposition subpoenas on December 6, 2021. Jassy Decl. ¶¶ 4-5.
 22 During the deposition, and in letters dated November 18, 2021 and December 14, 2021,

23 ³ While this matter has not yet been assigned a magistrate judge at the time of the
 24 exchange of this Joint Stipulation, given the procedural posture under Rule 45, Judge
 25 Patricia Donahue’s procedures provide guidance on how this District addresses untimely
 26 motions.

27 ⁴ Per Judge Kaplan’s scheduling order in the underlying civil litigation, the close
 28 of discovery was extended from October 1, 2021 to January 18, 2021, and final pretrial
 filing deadlines are now set for February 18, 2022. Fowler’s papers sent to Vary’s
 counsel failed to include “a copy of the order establishing the initial case schedule, as
 well as any amendments,” in violation of Local Rule 37-2.1.

1 Vary's counsel repeatedly advised Fowler's counsel that he would invoke the Reporter's
 2 Privilege/Shield in response to any questions about newsgathering and unpublished
 3 materials. Jassy Decl. ¶ 6. Fowler therefore had ample notice of Vary's positions and
 4 objections, yet he waited until weeks after the close of discovery to file this motion.

5 It is also noteworthy that Fowler waited until the final weeks of already-extended
 6 discovery deadlines to seek *any* discovery from Vary. If the discovery were as critical
 7 as Fowler now contends, he would have sought it before the first discovery cut-off in
 8 October 2021. *See* Scolnick Decl. ¶ 4 (first subpoena was issued to Vary on November
 9 4, 2021). Now, noticing a hearing for this motion to compel for *after* summary judgment
 10 and final pretrial filing deadlines in the underlying litigation, Fowler undermines any
 11 argument that such discovery is relevant, let alone necessary to support his defenses.
 12 Courts disfavor the "bad faith gamesmanship" of raising eleventh hour discovery
 13 disputes. *Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d 1137, 1141 (D. Nev. 2015).

14 **2. Fowler Did Not Comply with Local Rule 37-2.1.**

15 Local Rule 37-2.1 requires the parties to explain what they did to try to
 16 compromise on an issue or dispute. Fowler offered zero compromise on the deposition
 17 questions he now puts at issue. His only purported compromise was that he did not want
 18 to know the identities of any confidential sources, but that does not implicate any of the
 19 deposition questions at issue. Vary, on the other hand, did offer to compromise. Vary
 20 agreed to review his deposition transcript to determine what more he could provide that
 21 would not be protected from disclosure by the reporter's shield/privilege. Jassy Decl. ¶
 22 7. He also agreed to shorten the review period from 30 days to 20 days from the date he
 23 could access the transcript. *Id.* Fowler brings this motion before those 20 days have
 24 even expired. *Id.*

25 **3. Fowler's Motion Suffers Numerous Procedural Defects.**

26 Under the Federal Rules of Civil Procedure, Local Rules of the Central District
 27 of California, and individual procedures of several District Judges and Magistrate
 28 Judges of this District, Fowler's motion is defective on several other grounds. First, the

1 served notice of motion does not state before which judge, or in which courtroom, the
 2 motion will be heard and instead presumes a hearing date and time before seeking
 3 assignment to any judge in this District. Second, the Document Subpoena at issue was
 4 not properly served on Vary (counsel accepted service of the second records subpoena
 5 to Vary, but not the third Document Subpoena, which is the one at issue). Third, the
 6 Deposition Subpoena that Fowler seeks to enforce did not issue out of the court where
 7 the action is pending, in violation of FRCP 45(a)(2). Fourth, Fowler's counsel did not
 8 comply with L.R. 37-1 because counsel's letter did not: (a) identify "each" issue and/or
 9 discovery request in dispute, *see* Ex. 6; (b) specify the terms of the order sought—*e.g.*,
 10 no mention of seeking an order of contempt, *id.*; and (c) like this motion, Fowler
 11 provided almost no legal authority, and certainly nothing "dispositive." Scolnick Decl.,
 12 Exs. 6 and 7 at 2. Fifth, Fowler did not comply with the court-mandated pre-motion
 13 discovery conference obligations specifically required by several judges in this District.

14 **4. Vary Only Declined to Answer Questions That Related to His**
 15 **Role as a Journalist.**

16 Vary only opted not to answer deposition questions where the questions called for
 17 privileged information. It is true that Vary and Rapp were friends before any articles
 18 concerning Rapp and Fowler were published, but, contrary to Fowler's
 19 misrepresentations, Vary did *not* refuse to testify about his friendship with Rapp. Vary
 20 willingly answered questions about his connection to Rapp that were unrelated to Vary's
 21 role as a journalist. *See, e.g.*, Jassy Decl., Ex. 11 at 38:6-22, 58:17-63:14, 64:8-16, 66:3-
 22 67:21. Vary also responded to questions about the general practices of journalists. *See,*
 23 *e.g.*, Jassy Decl., Ex. 11 at 39:24-40:3, 72:1-75:17, 103:10-104:13, 108:5-109:19.
 24 However, if a question potentially called for the disclosure of unpublished information
 25 related to Vary's newsgathering and reporting on specific stories (e.g., about Fowler),
 26 counsel objected and instructed (nearly always) "to the extent" that it called for such
 27 information, but also instructed that Vary could otherwise answer the question.
 28 Sometimes Vary determined that he could answer the question in whole or in part, and

1 sometimes he determined that he could not. Very frequently, Vary answered the question
 2 at least in part because he understood the instruction to only apply to unpublished
 3 information. *See, e.g.*, Jassy Decl., Ex. 11 at 26:11-20, 27:1-9, 30:13-20, 31:11-32:1,
 4 32:15-33:4, 47:6-18, 63:16-64:6, 64:20-65:6, 67:25-69:14, 116:20-117:9, 121:22-122:7,
 5 126:2-12, 129:8-134:24, 146:15-147:3, 156:19-157:10, 158:14-159:1, 160:24-161:10,
 6 168:10-23, 169:13-24, 170:18-171:18, 190:12-25, 193:3-194:8, 204:12-20, 208:17-
 7 209:2, 211:7-24, 212:13-213:2, 215:11-216:4, 222:16-223:4, 225:20-227:21, 228:24-
 8 229:7, 229:15-230:1, 242:20-243:11, 243:20-245:5, 249:9-250:13, 251:2-252:3. A
 9 thoughtful line was drawn, and it is inaccurate for Fowler to suggest anything to the
 10 contrary.

11 **5. California Law Applies and Shields Vary from Further**
 12 **Deposition Testimony.**

13 **a. California Law Provides Reporters Like Vary with**
 14 ***Absolute Protection in a Civil Case.***

15 In California, journalists are protected from having to disclose confidential
 16 sources and unpublished, non-confidential information as codified in the California
 17 Constitution, Art. 1, § 2(b) and California Evidence Code § 1070(a) (collectively,
 18 “California’s Shield Law”). California’s Shield Law protects journalists from having to
 19 “disclose *any* unpublished information obtained or prepared in gathering, receiving or
 20 processing of information for communication to the public.” Cal. Const., art. I, § 2(b)
 21 (emphasis added); *O’Grady v. Super. Ct.*, 139 Cal. App. 4th 1423, 1459-60 (2006)
 22 (applying California’s Shield Law to online journalists). Under California’s Shield Law,
 23 “unpublished information,” which is protected from disclosure in the face of a subpoena,
 24 includes *any* “information not disseminated to the public by the person from whom
 25 disclosure is sought, whether or not related information has been disseminated and
 26 includes, but is not limited to, all … data of whatever sort not itself disseminated to the
 27 public through a medium of communication, whether or not published information based
 28 upon or related to such material has been disseminated.” *Id.*

1 California's Shield Law applies absolutely in civil cases, providing an "absolute
 2 immunity" from contempt in civil cases, and "'**absolute** protection to nonparty journalists
 3 in civil litigation from being compelled to disclose unpublished information[.]'" *New*
 4 *York Times Co. v. Superior Court*, 51 Cal. 3d 453, 456-57, 461-462 (1990) (emphasis
 5 added; quoting decision from Court of Appeal, which the Supreme Court affirmed); *see*
 6 *also McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 119-120 (2007) ("the Shield
 7 Law confers an absolute immunity against compelled disclosure of the protected
 8 information and, although that immunity must occasionally yield when it threatens to
 9 frustrate the competing federal constitutional right of a criminal defendant to a fair trial,
 10 there is no analogous competing right of a civil litigant that will suffice to overcome the
 11 immunity"). "Since contempt is generally the only effective remedy against a non-party
 12 witness, the California [Shield Law] grant[s] such witnesses virtually absolute
 13 protection" in civil cases. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274 (1984); *In re*
 14 *Willon*, 47 Cal. App. 4th 1080, 1091 (1996) (same).

15 Article 1, Section 2(b) of the California Constitution was enacted in 1980 by an
 16 overwhelming majority of California voters. By elevating the protection from a statute
 17 – Evidence Code § 1070 – to the state constitution, the California electorate demonstrated
 18 their belief in the need to give journalists the maximum possible shield for information
 19 obtained in their newsgathering activities. Recognizing this mandate, the Court of
 20 Appeal observed in *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14,
 21 27-28 (1984), that the interests of the press are favored over having civil actions
 22 determined on a full record:

23 The elevation to constitutional status must be viewed as an
 24 intention to favor the interest of the press in confidentiality
 25 over the general and fundamental interest of the state in
 26 having civil actions determined upon a full development of
 27 material facts. . . . It has long been acknowledged that our
 28 state Constitution is the highest expression of the will of the
 people acting in their sovereign capacity as to matters of
 state law.

1 As the California Supreme Court explained in *Delaney v. Superior Court*, 50
 2 Cal. 3d 785 (1990), the Shield Law applies to *any* unpublished information, *even if it is*
 3 *not confidential*:

4 [Article 1, Section 2(b)] states plainly that a newperson
 5 shall not be adjudged in contempt for ‘refusing to disclose
 6 any unpublished information’.... The use of the word ‘any’
 7 makes clear that article I, section 2(b) applies to all
 8 information, regardless of whether it was obtained in
 9 confidence. Words used in a constitutional provision
 ‘should be given the meaning they bear in ordinary use.’....
 In the context of article I, section 2(b), the word ‘any’ means
 without limit and no matter what kind.

10 *Id.* at 798; *see also New York Times*, 51 Cal. 3d at 461-62 (unpublished photographs of
 11 a public event that photojournalist witnessed are protected by California’s Shield Law);
 12 *Miller v. Superior Court*, 21 Cal. 4th 883, 897 (1999) (“the shield law applies to
 13 unpublished information whether confidential or not”).

14 Where, as here, the material is sought by a civil litigant, there is no federal or state
 15 constitutional right that can be weighed against Mr. Vary’s rights under the California
 16 Constitution. As the court noted in *Playboy*: “[c]ivil litigants do not have a constitutional
 17 right to unrestricted discovery of relevant information.” 154 Cal. App. 3d at 25; *see also*
 18 *McGarry*, 154 Cal. App. 4th at 119-120 (same). Thus, in civil litigation, no balancing of
 19 opposing interests is appropriate because California’s Shield Law absolutely protects
 20 information from disclosure. *Id.*; *New York Times*, 51 Cal. 3d at 462 (a civil litigant has
 21 no federal or state constitutional rights which are sufficient to overcome rights under
 22 California Shield Law).

23 In *Los Angeles Memorial Coliseum Comm’n v. National Football League*, 89
 24 F.R.D. 489, 495 (C.D. Cal. 1981), the federal court granted journalists’ motions to quash
 25 subpoenas for their depositions and newsgathering materials, relying in part on
 26 California’s Shield Law, which, the court held, “reflects a paramount public interest in
 27 the maintenance of a vigorous, aggressive and independent press capable of participating
 28 in robust, unfettered debate over controversial matters, an interest which has always been

¹ a principal concern of the First Amendment.”” *Id.* (quoting *Baker v. F&F Investment*, 470 F.2d 778, 782 (2d Cir. 1972)).

Under California's Shield Law, Vary has an *absolute* constitutional right not to disclose "any unpublished information obtained or prepared in gathering, receiving or processing of information" in this civil case, and Fowler has no competing constitutional right that could overcome Vary's rights. Cal. Const., art. I, § 2(b) (emphasis added); *New York Times*, 51 Cal. 3d at 456-57, 461-462; *McGarry*, 154 Cal. App. 4th at 119-120; *Playboy*, 154 Cal. App. 3d at 25. This absolute rule applies "whether or not published information based upon or related to such material has been disseminated." Cal. Const., art. I, § 2(b).⁵

b. Contrary to Fowler's Contentions, California's Shield Law Applies Here, Not New York's.

i. Under Rule 45, the Laws of this Court Govern.

14 California's robust protections for reporters apply to this discovery dispute. Vary
15 is a third-party witness who resides and works in the Central District of California, and
16 has at all times relevant to this matter. Jassy Decl. ¶ 2; *id.*, Ex. 11 at 70:7-11, 77:17-
17 90:16, 90:2-93:22 (Vary work history). Any documents in his possession, custody, and
18 control are in the Central District of California. *Id.* Fowler served Vary with multiple
19 subpoenas under Federal Rule of Civil Procedure 45. Under Federal Rule of Civil
20 Procedure 45, motions to compel third-party discovery must be brought in the district

25 ⁵ Fowler makes a weak argument that, although this is civil litigation, applying
26 civil procedure, arising under civil claims of assault, battery, and intentional infliction of
27 emotional distress, he is somehow a criminal defendant even though he acknowledges
28 that “this is not a criminal case.” When Fowler’s counsel was asked in the meet and
confer process, “So if Fowler loses this civil case that would mean that he is a criminal?,”
his counsel candidly replied: “Of course not.” Jassy Decl. ¶ 8. Of course not. Fowler is
a civil, not a criminal defendant, here.

1 where *compliance* is required, which, in this case, is the Central District of California.
 2 Fed. R. Civ. P. 45(d)(2)(B)(i).⁶

3 Third-party subpoenas are assessed under the law of the jurisdiction enforcing
 4 them. *Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1271 (W.D. Wash. 2010) (in a
 5 federal question case, applying Ninth Circuit, rather than Seventh Circuit, law invoking
 6 the reporter’s privilege to grant a Washington state journalist’s Rule 45 motion to quash
 7 while litigation proceeded in Illinois). “Where the court hearing the discovery dispute
 8 and the court hearing the underlying action differ, the court hearing the discovery dispute
 9 must apply the choice of law rules of its forum.” *Wolpin v. Philip Morris Inc.*, 189 F.R.D.
 10 418, 423 (C.D. Cal. 1999) (applying California privilege law in a discovery dispute while
 11 underlying litigation proceeded in the Southern District of Florida). This Court has
 12 jurisdiction over this discovery dispute.

13 Rule 45 explicitly provides for courts to hear discovery disputes while underlying
 14 litigation is pending in other district courts. *See* Fed. R. Civ. P. 45(d)(2)(B)(i). The
 15 underlying civil litigation here is a diversity case in the Southern District of New York
 16 brought by Rapp (from New York) against Fowler (from Maryland). *Anthony Rapp v.*
 17 *Kevin Spacey Fowler*, No. 20-cv-09586-LHK (S.D.N.Y.). Fowler’s present motion to
 18 compel Vary, a California third-party witness for additional deposition testimony and
 19 documents, should be addressed under California law.

20 State substantive law preventing disclosure of information applies where not
 21 preempted by federal law. *Lee v. Glob. Tel*Link Corp.*, No. 15-cv-2495-ODW-PLAX,
 22 2017 WL 10575166, at *7 (C.D. Cal. Sept. 6, 2017) (citing *Robinson v. Kia Motors*
 23 *America, Inc.*, 2011 WL 2433369, at *2 (E.D. Cal. June 13, 2011) (noting that if a state
 24 statute protecting the disclosure of information pursuant to a subpoena is a “substantive
 25 policy statute,” the court then considers whether any federal law preempts the state
 26 statute)). Federal Rule of Civil Procedure 45 explicitly provides for exemption of

27
 28 ⁶ Fowler’s passing request to transfer this motion, should be summarily rejected
 because Vary does not consent to the transfer and Fowler makes no showing of any
 “exceptional circumstances” that would warrant a transfer. F.R.C.P. 45(d)(2)(B)(i).

1 disclosure for “privileged or other protected matter.” Fed. R. Civ. P. 45(d)(3), (e)(2); *see*
 2 *id.* California’s Shield Law is a substantive right enshrined in the California
 3 Constitution. *See Playboy Enters.*, 154 Cal. App. 3d at 27-28. Federal law does not
 4 preempt California’s Shield Law.

5 *ii. California Has a Greater Interest in Enforcing its*
 6 *Shield Law.*

7 “[T]he court hearing the discovery dispute must apply the choice of law rules of
 8 its forum.” *Wolpin*, 189 F.R.D. at 423. Applying the California conflict-of-law analysis,
 9 government interests weigh in favor of applying California’s Shield Law, rather than
 10 New York’s reporter’s privilege law as Fowler contends. California courts apply a three-
 11 step government interest conflict-of-law analysis. *Pokorny v. Quixtar, Inc.*, 601 F. 3d
 12 987, 994 (9th Cir. 2010). Generally, the forum will apply its own law of decision, but
 13 the party invoking foreign law bears the burden of showing the foreign forum’s interest.
 14 *Washington Mut. Bank, FA v. Superior Ct.*, 24 Cal. 4th 906, 918 (2001). Fowler has
 15 failed to meet his burden here.

16 First, the court determines whether the relevant law is the same or different.
 17 California’s Shield Law is a state constitutional right and provides absolute immunity for
 18 non-party journalists against disclosing unpublished information in civil litigation. Cal.
 19 Const., art. I, § 2(b); *New York Times*, 51 Cal.3d at 455-56. In contrast, New York’s
 20 reporter’s privilege law is a qualified right subject to a balancing test. N.Y. Civ. Rights
 21 L. § 79-h; *O’Neill v. Oakgrove Const., Inc.*, 523 N.E.2d 277, 277-78 (N.Y. 1988)
 22 (recognizing that N.Y. Const., art. I, § 8 and the First Amendment to the U.S. Constitution
 23 provide a qualified immunity from disclosure for reporters’ information prepared or
 24 collected in the course of newsgathering). In California, there is no balancing test to
 25 determine if California’s Shield Law applies in a civil case; there is absolute protection
 26 from disclosure for third-party reporters’ unpublished newsgathering materials in civil
 27 litigation. *New York Times*, 51 Cal. 3d at 461. Whereas New York state’s qualified
 28 privilege means the reporter’s privilege may be overcome if the disclosure sought is (i)

1 is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's
 2 claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any
 3 alternative source. N.Y. Civ. Rights L. § 79-h(c).⁷ The difference between an absolute
 4 and qualified immunity is material.

5 Second, because the laws are materially different, the court must then determine
 6 what interest each state has in having its law applied. *Washington Mut. Bank*, 24 Cal.
 7 4th at 920. California has a substantial interest in protecting the constitutional rights of
 8 its citizens, while New York's interest here is minimal. As stated above, Vary resides in
 9 California, maintains his files in California, sat for a deposition in California, and
 10 engaged in relevant newsgathering communications from California. Jassy Decl. ¶ 2;
 11 *id.*, Ex. 11 at 70:7-11, 77:17-90:16, 90:2-93:22 (Vary work history). The state of
 12 domicile for the person asserting privilege weighs heavily in choice-of-law analysis. *See*
 13 *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89, 91 (S.D. Cal. 1987)
 14 (applying California state privilege law to discovery dispute while underlying diversity
 15 case proceeded in District of Massachusetts). A source's – *e.g.*, Rapp's – expectation's
 16 when speaking with a California reporter also weighs in favor of applying California law.
 17 *See id.* at 92.

18 Meanwhile, neither party to this discovery dispute – *i.e.*, neither Fowler nor Vary
 19 – is a New York resident, and New York's interest here is only linked to the underlying
 20 litigation in the Southern District of New York. “The fact that the underlying litigation
 21 is pending in [a foreign district] is not controlling.” *Connolly Data Sys.*, 114 F.R.D. at
 22 92. Fowler argues that New York has an interest because Vary's former employer,
 23 *BuzzFeed*, is located in New York. But Fowler subpoenaed Vary, not *BuzzFeed*, for the
 24 documents in Vary's control; and Vary has no possession, custody, or control of his

25
 26 7 Even if the Court were to apply New York's qualified privilege law – which
 27 Vary contends would be improper under a choice of law analysis – Fowler would not be
 28 able to overcome New York's qualified privilege which is even more stringent than the
 Ninth Circuit's First Amendment-based qualified privilege discussed below. Because
 Fowler cannot overcome the Ninth Circuit's privilege, he also could not overcome New
 York's privilege.

1 former employer's documents. New York has only tenuous interest in a third-party
 2 California journalist's assertion of privilege in a California deposition.

3 To the extent the Court finds New York has any interest (Vary asserts it does not),
 4 the Court should then take the final step to select the state whose interests would be
 5 "more impaired" if its law were not applied. *Washington Mut. Bank*, 24 Cal. 4th at 920.
 6 California, the forum state, the deponent's home state, and the state with the more robust
 7 protection for journalists would see its interests more impaired if New York law were
 8 applied. California has elevated its protection of journalists to constitutional status,
 9 reflecting "an intention to favor the interest of the press in confidentiality over the general
 10 and fundamental interest of the state in having civil actions determined upon a full
 11 development of material facts." *Playboy*, 201 Cal. App. at 27-28. California has
 12 demonstrated a significant government interest in protecting California reporters from
 13 overreaching discovery. Disregarding California law would undermine "the paramount
 14 law of the state." *Id.* On the other hand, New York has codified its own reporter's shield,
 15 albeit a weaker one, into state law. N.Y. Civ. Rights L. § 79-h. From a policy
 16 perspective, New York shares California's interest in protecting reporters' unpublished
 17 newsgathering materials albeit not as robustly as California does. New York's interests
 18 would not be as impaired if California law were applied. Accordingly, government
 19 interests favor applying California's Shield Law in this discovery dispute.

20 **c. Vary Did Not Waive Any Rights.**

21 Fowler incorrectly asserts that Vary somehow waived his constitutional rights
 22 when *Rapp* disclosed some of his communications with Vary in the discovery process.
 23 Rapp is the plaintiff, is a party to this litigation, is not a journalist, and did not act in a
 24 newsgathering capacity. Rapp never had a reporter's shield or privilege to assert. The
 25 reporter's privilege "belongs to the journalist alone and cannot be waived by persons
 26 other than the journalist." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 89
 27 F.R.D. 489, 494 (C.D. Cal. 1981) (rejecting the argument that the journalist's privileged
 28 was waived when some sources voluntarily identified themselves to the public). Even

1 under the out-of-circuit authority Fowler cites regarding marital communications (not the
 2 reporter's shield or privilege) confirms that "a waiver requires an intentional disclosure
 3 of the content of the confidential communication *by the party seeking to invoke the*
 4 *privilege.*" *United States v. Bahe*, 128 F.3d 1440, 1442 (10th Cir. 1997) (emphasis
 5 added).

6 Fowler points to no authority that requires journalists to intervene and move to
 7 quash in order to preserve the reporter's shield or privilege. Indeed, courts have
 8 rejected the argument that journalists *may* intervene to assert their privilege over
 9 records held by third-party sources. *See, e.g., Greenfield v. Schultz*, 660 N.Y.S.2d 624
 10 (N.Y. Sup. Ct. N.Y. County 1997), *aff'd in part, vacated in part*, 673 N.Y.S.2d 684 (1st
 11 Dep't 1998) (rejecting the *New York Times*' effort to intervene to stop defendant from
 12 producing phone billing records that would reveal an editor's confidential sources).
 13 Vary does and has firmly asserted the Reporter's Privilege/Shield in this discovery
 14 dispute, before the deposition, during the deposition, and after the deposition, and he
 15 has not waived it.

16 * * *

17 California's substantive law applies here, and California's Shield Law affords
 18 Vary with an absolute constitutional right not to disclose "any unpublished information
 19 obtained or prepared in gathering, receiving or processing of information" in this civil
 20 case. Cal. Const., art. I, § 2(b); *New York Times*, 51 Cal. 3d at 456-57, 461-62;
 21 *McGarry*, 154 Cal. App. 4th at 119-20; *Playboy*, 154 Cal. App. 3d at 25. Thus, even if
 22 the Court determines that Fowler's motion is procedurally proper, the Court's
 23 substantive analysis can end here because of the absolute protections afforded to Vary.
 24 The motion should be denied in full and sanctions should be awarded to Vary.

25 **6. Vary Is Also Protected under the First Amendment.**

26 Nearly a half century ago, the United States Supreme Court in *Branzburg v. Hayes*,
 27 408 U.S. 665, 681 (1972), expressly recognized that newsgathering activities qualify for
 28 First Amendment protection: "Without some protection for seeking out the news,

1 freedom of the press could be eviscerated.” *Id.* The Ninth Circuit has held that
 2 *Branzburg* established a constitutionally-based qualified privilege for journalists to resist
 3 the disclosure of information gathered or obtained during the course of newsgathering
 4 activities: “Rooted in the First Amendment, the privilege is a recognition that society’s
 5 interest in protecting the integrity of the newsgathering process, and in ensuring the free
 6 flow of information to the public, is an interest ‘of sufficient social importance to justify
 7 some incidental sacrifice of sources of facts needed in the administration of justice.’”
 8 *Shoen v. Shoen* (“*Shoen I*”), 5 F.3d 1289, 1292 (9th Cir. 1993) (internal citations
 9 omitted); *see also U.S. v. Pretzinger*, 542 F.2d 517, 520-521 (9th Cir. 1976) (affirming
 10 decision not to compel reporter to disclose source in criminal case, holding that, “district
 11 judge must balance the interest of confidentiality of news sources against the needs of
 12 the criminal justice system to know the identity of the source”). In holding that the
 13 qualified privilege attached to subpoenaed, unpublished, non-confidential information
 14 obtained by a book author, the Ninth Circuit stated: “the journalist’s privilege recognized
 15 in *Branzburg* [is] a partial First Amendment shield that protects journalists against
 16 compelled disclosure in all judicial proceedings, civil and criminal alike.” *Shoen I*, 5
 17 F.3d at 1292. This privilege reflects “the preferred position of the First Amendment and
 18 the importance of a vigorous press.” *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

19 Courts repeatedly have recognized that subpoenas to non-party journalists pose a
 20 pernicious threat to freedom of the press. Indeed, “news gathering is *essential* to a free
 21 press”:

22 Without an unfettered press, citizens would be far less able to
 23 make informed political, social, and economic choices. But
 24 the press’ function as a vital source of information is
 25 weakened whenever the ability of journalists to gather news
 26 is impaired.

27 *Zerilli*, 656 F.2d at 711 (emphasis added) (quoting *New York Times Co. v. United*
 28 *States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

1 These public policy concerns apply to the compelled disclosure of underlying
 2 resource materials, which is precisely the type of material sought here. *Shoen II*, 48 F.3d
 3 at 416; *Shoen I*, 5 F.3d at 1294-95 (identifying a number of harms, including the risk of
 4 appearing as a “research tool” of the government or private parties); *United States v. La*
 5 *Rouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (“We discern a lurking and subtle
 6 threat to journalists and their employers if disclosure of outtakes, notes, and other unused
 7 information, even if nonconfidential, becomes routine and casually, if not cavalierly,
 8 compelled”). This is due in part to the fact that “court-enforced access to journalistic
 9 resources would risk the symbolic harm of making journalists appear to be an
 10 investigative arm of the judicial system, the government, or private parties.” *Gonzales*
 11 *v. NBC*, 194 F.3d 29, 35 (2d Cir. 1999). The Ninth Circuit has also recognized the
 12 substantial burden that compliance with subpoenas can impose on reporters, noting that
 13 the “frequency of subpoenas would not only preempt the otherwise productive time of
 14 journalists and other employees but measurably increase expenditures for legal fees.”
 15 *Shoen I*, 5 F.3d at 1295 (citation omitted).

16 The Ninth Circuit holds that the privilege applies broadly to protect both
 17 confidential *and non-confidential* material and information. *Shoen I*, 5 F.3d at 1295;
 18 *Shoen v. Shoen* (“*Shoen II*”), 48 F.3d 412, 414 (9th Cir. 1995). Disclosure of confidential
 19 information or non-confidential unpublished information may be compelled “only upon
 20 a showing that the requested material is: (1) unavailable despite exhaustion of all
 21 reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an
 22 important issue in the case.” *Shoen II*, 48 F.3d at 416. *Shoen II* also requires that the
 23 party seeking to overcome the privilege “must [make] a showing of actual relevance; a
 24 showing of potential relevance will not suffice.” *Id.* The three-part constitutional test
 25 under *Shoen II* is necessarily a “high hurdle against compelled disclosure from third party
 26 journalists.” *Harbert v. Priebe*, 466 F. Supp. 2d 1214 (N.D. Cal. 2006). Fowler’s motion
 27 makes passing references to these standards, but fails to show how he can satisfy his
 28 burden with respect to *any* deposition questions.

a. Fowler’s Deposition Questions About Vary’s Newsgathering Are Not “Clearly Relevant.”

3 Fowler’s questions about Vary’s newsgathering and unpublished reporting are not
4 “**clearly relevant** to an important issue” in the case. *Shoen II*, 48 F.3d at 416 (emphasis
5 added); *Burke*, 700 F.2d at 77 (holding that First Amendment-privileged materials are
6 not subject to disclosure because a criminal defendant failed to make a “clear and specific
7 showing that [subpoenaed] documents were necessary or critical to the maintenance of
8 his defense”).⁸ As explained in *Shoen II*, the party seeking to overcome the privilege
9 “must [make] a showing of actual relevance; a showing of potential relevance will not
10 suffice.” 48 F.3d at 416. It is not sufficient that the information sought would be
11 “useful.” *Krase v. Graco Children Prod., Inc.*, 79 F.3d 346, 351 (2d Cir. 1996). Instead,
12 there must be a finding that the claim for which the information is to be used “virtually
13 rises or falls” on the admission of the materials. *Id.*⁹

14 Here, Fowler asserts, without any supporting evidence, that certain portions of
15 Vary's article may contradict other purported facts recounted by Fowler. For example,
16 Fowler simply asserts that there were "inconsistent details" such as the last time Rapp

⁸ See also *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (holding in criminal case that party issuing subpoena for privileged information must show that material is “highly relevant” and “necessary to the proper presentation of the case”); *United States v. Cuthbertson*, 651 F.2d 189, 196 (3d Cir. 1981) (holding that criminal defendant must prove that information is “crucial to the claim”); *Zerilli*, 656 F.2d at 713 (holding that material sought must “go to the ‘heart of the matter’” and be “crucial to the case”).

²² For example, courts reject subpoenas to journalists designed to elicit impeachment evidence. *See Holland v. Centennial Homes, Inc.*, 22 Med. L. Rptr. 2270, 2275 (N.Y. Sup. Ct. 1985); *New York v. Troiano*, 11 Med. L. Rptr. 1896, 1899-1900 (N.Y. Sup. Ct. 1985) (asserted need for cross-examination material inadequate to overcome privilege because not critical; applying federal and state journalist's privilege). Even in criminal cases, and even when the information is non-confidential, the need for privileged newsgathering information for purposes of impeachment generally is not sufficient to overcome the qualified privilege. *See, e.g., Burke*, 700 F.2d at 78. *See also United States v. Fields*, 663 F.2d 880, 881 (9th Cir. 1981) (a pre-trial subpoena to a non-party in a criminal case may not be used to gather evidence simply for possible impeachment).

1 saw Fowler (whether it was at the 2008 Tony Awards or on another occasion) and the
 2 purported age of Rapp's friend (a certain John Barrowman), but, even if there were
 3 inconsistencies, none of that is "clearly relevant" to whether Fowler assaulted Rapp in
 4 1986. Nothing about Rapp's case against Fowler for assault, battery, and IIED "rises or
 5 falls" on these details. In any event, the privilege may not be pierced on speculation that
 6 it will lead to impeachment evidence. *See Burke*, 700 F.2d at 78; *Fields*, 663 F.2d at 881.

7 Vary and his work are not on trial. Vary stands by his newsgathering and the
 8 accuracy of his articles, but nothing is stopping Fowler from trying to convince a jury
 9 that certain aspects of Rapp's story are false or inconsistent. Whether there are
 10 inaccuracies or contradictions in Vary's work in 2017-2018 – which Vary denies – are
 11 not "clearly relevant" to whether Fowler sexually assaulted Rapp in 1986, when Rapp
 12 was 14 years old. Such supposed inconsistencies are not "clearly relevant," *Shoen II*, 48
 13 F.3d at 416, nor can they otherwise be considered "crucial to the case," *Zerilli*, 656 F.2d
 14 at 713.

15 **b. Fowler Does Not Show He Has Exhausted Alternative
 16 Sources.**

17 Virtually all cases applying the privilege agree that discovery should be denied
 18 unless the requesting party has exhausted all alternative sources of obtaining the needed
 19 information. For example, in *Cuthbertson*, 651 F.2d at 196, the Third Circuit held that
 20 the criminal defendants had not satisfied the element of proving that the "only practical
 21 access to the information" sought was from outtakes of interviews, noting that the
 22 defendants could "themselves interview these same interviewees, whose identity they
 23 know, to obtain the desired information." Similarly, in *New Jersey v. Boiardo*, 414 A.2d
 24 14, 21 (N.J. 1980), the court quashed a subpoena served by a criminal defendant who
 25 sought letters written by one of the prosecution's witnesses to a journalist. The court's
 26 decision was based in part on the fact that the defendant had failed to show that the
 27 information contained in the letters was unavailable from other sources, even if the
 28 precise letters were not available from other sources. *Id.* at 23.

1 Here, Fowler has not shown that he has exhausted all alternative sources. For
2 example, he references Vary's and Rapp's purported discussions about a Mr.
3 Barrowman, but Fowler has not established that he deposed or even interviewed Mr.
4 Barrowman. Fowler also contends that "Rapp also has mischaracterized Mr. Fowler's
5 response to Mr. Vary's request for comment on his Buzzfeed article." Even if that were
6 true, Vary would not be able to speak to Rapp's characterizations of Fowler's response,
7 and Fowler can make his own assertions about his own response (or lack thereof) to
8 Vary's repeated requests for comment.

c. Fowler Failed to Show That the Requested Information Would Not Be Cumulative.

11 Cumulative information cannot reach the level of significance required to
12 overcome the reporter's privilege. *Shoen II*, 48 F.3d at 416; *Burke*, 700 F.2d at 78
13 (subpoena quashed because information sought by criminal defendant "would be merely
14 cumulative and would not defeat [the] First Amendment privilege"). Here, for example,
15 Fowler insists on getting texts from Vary that he already obtained pursuant to document
16 requests from Rapp as a party litigant and asking questions about the messages that he
17 could (or should have) asked Rapp.

18 In sum, Fowler has not articulated how he can overcome all three prongs of the
19 Ninth Circuit’s First Amendment-based privilege for *each* question he wants to ask Vary
20 again in deposition, and the Court should not be put to the task of doing that for him. For
21 this additional reason, Fowler’s motion as to the Deposition Subpoena should fail.

7. Vary Is Further Protected by the Common Law.

23 While the Ninth Circuit has recognized the qualified privilege as constitutionally
24 based, federal common law independently supports a journalist's privilege. This
25 privilege arises under Federal Rule of Evidence Rule 501, which was adopted after
26 *Branzburg* and provides in relevant part that "privilege(s) ... shall be governed by the
27 principles of the common law as they may be interpreted by the courts of the United

1 States in the light of reason and experience.” Fed. R. Evid. 501.¹⁰ The House Report
 2 accompanying the 1975 adoption of Rule 501 explained that the federal common law of
 3 privileges is “to be developed by the courts of the United States under a uniform standard
 4 applicable both in civil and criminal cases.” Fed. R. Evid. 501, Adv. Comm. Note, H.R.
 5 No. 93-650 (1974).

6 In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the United States Supreme Court
 7 established the framework for evaluating privileges under the federal common law. As
 8 a guide to interpreting Rule 501, the Court referred to the “oft-repeated observation that
 9 ‘the common law is not immutable but flexible, and by its own principles adapts itself to
 10 varying conditions.’” *Id.* at 8.¹¹ The Second Circuit held that, “[a]bsent a federal statute
 11 to provide specific instructions, courts which must attempt to divine the contours of non-
 12 statutory federal law governing the compelled disclosure of confidential journalistic
 13 sources must rely on both judicial precedent and well-informed judgment as to the proper
 14 federal public policy to be followed in each case.” *Baker*, 470 F.2d at 781. For example,
 15 in *Los Angeles Memorial Coliseum Comm'n*, 89 F.R.D. at 492, a federal court in
 16 California recognized the well-established qualified federal common law privilege and
 17 applied the privilege in a civil case covering journalists’ sources and non-confidential
 18 work product.

19
 20

¹⁰ But as detailed above, state privilege law may apply in diversity cases. Fed. R.
 21 Evid. 501.

22 ¹¹ The legislative history of Rule 501 – dating back more than forty years –
 23 anticipated that the law of privilege would evolve to recognize a journalist’s privilege.
 24 For example, Representative Hungate, Chair of the House Judiciary Subcommittee on
 25 Criminal Justice and principal draftsman of Rule 501, believed that the rule “permits the
 26 courts to develop a privilege for newspaperpeople on a case-by-case basis,” and made
 27 clear that “[t]he language cannot be interpreted as a congressional expression in favor of
 28 having no such privilege, nor can the conference action be interpreted as denying to
 newspaperpeople any protection they may have from State newsperson’s privilege laws.”
 120 Cong. Rec. H12253-54 (daily ed. Dec. 18, 1974). *See also Riley v. Chester*, 612 F.2d
 708, 714 (3d Cir. 1979) (legislative history of Rule 501 “manifests that its flexible
 language was designed to encompass, *inter alia*, a reporter’s privilege not to disclose a
 source”).

1 The Ninth Circuit directs federal district courts to look to state law for guidance
 2 when the State has directly addressed the issue. *Gorenc v. Salt River Project Agric.*
 3 *Improvement & Power District*, 869 F.2d 503, 505 (9th Cir. 1989); *see also Jaffee*, 518
 4 U.S. at 12-13 (same). There is widespread consensus among the States regarding the
 5 existence and value of a journalist's privilege. Forty states (including California), as well
 6 as the District of Columbia, have codified the reporter's privilege.¹² Courts in nine
 7 additional states have recognized the journalist's privilege in at least some context in
 8 case law.¹³ Wyoming is the only State that has not weighed in.

9

10 ¹² See Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300, *et seq.*; Ariz. Rev. Stat.
 11 Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. art. I, § 2(b); Cal.
 12 Evid. Code § 1070; Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101, *et seq.*; Conn. Gen. Stat.
 13 Ann. § 52-146t; Del. Code. Ann. tit. 10, §§ 4320, *et seq.*; D.C. Code Ann. §§ 16-4702-
 14 4704; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-5-508; 735 Ill. Comp. Stat. 5/8-
 15 901, *et seq.*; Ind. Code § 34-46-4-1, 34-46-4-2; Kan. Stat. Ann. §§ 60-480, *et seq.*; Ky.
 16 Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-59; 16 Me. Rev. Stat. Ann. §
 17 61; Md. Code Ann. Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws § 767.5a; Minn. Stat.
 18 §§ 595.021, *et seq.*; Mont. Code Ann. §§ 26-1-901, *et seq.*; Neb. Rev. Stat. §§ 20-144, *et*
 19 *seq.*; Nev. Rev. Stat. Ann. § 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A21, *et seq.*; N.M.
 20 Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent.
 21 Code § 31-01-06.2; Ohio Rev. Code. Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12,
 22 § 2506; Or. Rev. Stat. §§ 44.510, *et seq.*; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws
 23 §§ 9-19.1-1, *et seq.*; S.C. Code Ann. § 19-11-100; S.D. HB 1074 (signed Mar. 5, 2019);
 24 Tenn. Code Ann. § 24-1-208; Tex. Civ. Proc. & Rem. Code §§ 22.021 *et seq.*; Tex. Code
 25 of Crim. Proc. Act 38.11 & 38.111; Utah Rule of Evid. 509; Wash. Rev. Code § 5.68.010;
 26 W. Va. Code § 57-3-10; Wis. Stat. Ann. § 885.14.

27 ¹³ See *Belanger v. City and County of Honolulu*, Civ. No. 93-4047-10 (Haw. 1st
 28 Cir. Ct. May 4, 1994) (unpublished) (civil); *Idaho v. Salsbury*, 924 P.2d 208 (Idaho 1996)
 (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard v. Oxberger*,
 258 N.W.2d 847 (Iowa 1977) (civil); *In re John Doe Grand Jury Investigation*, 574
 N.E.2d 373 (Mass. 1991) (grand jury); *Sinnott v. Boston Retirement Board*, 524 N.E.2d
 100 (Mass. 1988) (civil); *Ayash v. Dana-Farber Cancer Institute*, 822 N.E.2d 667 (Mass.
 2005) (civil); *Eason v. Federal Broad. Co.*, 697 So. 2d 435, 437 (Miss. 1997); *Hawkins*
 v. *Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) (unpublished opinion)
 (based on Miss. Const.); *Pope v. Village Apartments, Ltd.*, No. 92-71-436 CV (Miss. 1st
 Cir. Ct. Jan. 23, 1995) (unpublished opinion) (Gibbs, J.) (civil); *Mississippi v. Hand*, No.
 CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion) (criminal); *In*
 re *Grand Jury Subpoena*, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) (unpublished
 opinion) (grand jury); *Missouri ex rel. Classic III, Inc.*, 954 S.W.2d 650 (Mo. Ct. App.

1 The federal common law, as it looks to state law (in this case California law), is
 2 robust and provides another avenue and layer of protection for Vary. Again, California
 3 law provides an absolute protection against the disclosure of any type of unpublished
 4 information from a journalist in a civil case. Fowler's briefing does not address the
 5 federal common law even though it was raised repeatedly by Vary's counsel. *See, e.g.*,
 6 Ex. 7 at 7-9.

7 For all of the foregoing reasons, Fowler's motion as to the Deposition Subpoena
 8 should be denied.

9 **V. DOCUMENT SUBPOENA**

10 **A. Document Request No. 1**

11 ***Mr. Fowler's Request No. 1:***

12 All Documents Concerning any Communication between You and Plaintiff about
 13 Fowler.

14 ***Vary's Response to Request No. 1 :***

15 Vary incorporates by reference, as if fully set forth herein, the General Objections
 16 set forth above. Vary objects to this Request to the extent that it calls for material
 17 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 18 to the extent that it calls for material protected from disclosure by the attorney-client
 19 privilege, the attorney work product doctrine, and any other applicable privilege or
 20 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 21 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 22 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 23 extent that it calls for material that is publicly available and/or equally accessible to the
 24 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not

25
 26 1997) (civil); *New Hampshire v. Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of*
 27 *Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Vermont v. St. Peter*, 315
 28 A.2d 254 (Vt. 1974) (criminal); *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974) (criminal);
Clemente v. Clemente, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Co. v. ABC*, 36 Va.
 Cir. 1 (1995) (civil).

1 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 2 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 3 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 4 burden associated with searching for and producing potentially responsive materials, if
 5 any, is not proportionate to the relevance, if any, of the requested material.

6 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 7 to Document Request No. 1:***

8 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 9 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 10 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 11 made no showing that any reporters' privilege/shield applies to some or all documents
 12 called for by this request. Even if some material were covered by that protection, it does
 13 not apply for the reasons explained above, especially given there is no suggestion it
 14 implicates confidential information. During the meet and confer conference between
 15 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 16 confidential sources. The material sought by this request cannot be obtained elsewhere
 17 and is necessary for important issues in this case, including Rapp's credibility and the
 18 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 19 information.

20 Mr. Vary's other objections likewise are without merit. This request does not call
 21 for any attorney-client privileged or work product information, nor has Vary shown
 22 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 23 Vary already has known about and implicitly acquiesced to the production of his text
 24 messages with Rapp.

25 Mr. Vary's claims that this request calls for material outside his possession or
 26 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 27 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 28 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also

1 acknowledged he has not even attempted to look for any documents responsive to the
 2 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 3 unsubstantiated and illusory.

4 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 5 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 6 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 7 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 8 – must “describe the nature of the withheld documents, communications, or tangible
 9 things in a manner that, without revealing information itself privileged or protected, will
 10 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 11 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 12 responsive documents.

13 ***Mr. Vary's Statement Regarding Request No. 1:***

14 Vary drew consistent lines for the Document Subpoena: (1) Vary offered to
 15 produce published articles concerning Fowler, but Fowler's counsel stated that they
 16 already had the published articles and did not want them from Vary; (2) Vary produced
 17 his very limited direct communications with Rapp's counsel; (3) Vary would *not* produce
 18 unpublished newsgathering information concerning his reporting because of the
 19 reporter's privilege/shield as covered by California's Shield Law (Constitution, Art. 1, §
 20 2(b) and California Evidence Code § 1070(a)), the Ninth Circuit's First Amendment-
 21 based privilege and the common law; and (4) he would not undertake to search for or
 22 produce irrelevant documents – *i.e.*, documents that did not relate to Fowler, Rapp and
 23 the allegations in this case – unless Fowler could articulate in the meet and confer process
 24 a reason such material was relevant, but Fowler's counsel did not articulate any such
 25 reasons. *See* Ex. 7 at 10; Jassy Decl. ¶ 8. During the meet and confer process, Vary's
 26 counsel also offered to discuss any documents that did not fall into the aforementioned
 27 categories, but Fowler's counsel did take up Vary's counsel on that offer either. *Id.*

28

1 Vary repeatedly explained, categorically, what was being withheld on the basis of
 2 the Reporter's Privilege/Shield. For example, Vary's counsel's letter of January 5, 2022
 3 repeated the positions taken since before the Vary deposition about the document
 4 requests:

5 Our position is that all of Defendant's requests for
 6 production call for material protected from disclosure by,
 7 among other things, the Reporter's Privilege/Shield. Indeed,
 8 some do expressly and directly ... Without conceding that
 9 any documents Mr. Vary may have are relevant to this case,
 10 Mr. Vary's only potentially relevant connection to this case
 11 is in his capacity as a journalist and any documents he may
 12 have pertaining to the matter (such as notes, drafts,
 13 communications with sources and editors, etc.) were
 gathered and/or generated in the course of newsgathering,
 and are therefore protected from disclosure by the Reporter's
 Privilege/Shield. Any documents that are not protected by
 the Reporter's Privilege/Shield would not be relevant.

14 Ex. 7 at 9.¹⁴ Taking Request No. 1, for example, which asks for all communications
 15 between Rapp and Vary about Fowler, Vary's position is that *all* such communications
 16 and *all* documents "concerning" such communications would fall within either the
 17 Reporter's Privilege/Shield (if unpublished) or would be part of published articles
 18 (which Fowler's counsel already had and did not want or need from Vary).

19 As discussed above, Fowler cannot overcome the absolute protection from
 20 disclosure afforded by California's Shield Law. Moreover, he does not articulate how
 21 he can satisfy each of the three parts of the Ninth Circuit's First Amendment-based
 22 privilege with respect to each Request. And he makes no effort to address the common
 23 law privilege.

24 Fowler also insists on forcing Vary to generate a privilege log. Vary's counsel
 25 has explained that imposing such a burden on Vary is unwarranted when Vary is making
 26 categorical statements about what was privileged. Vary also asked for authority

27
 28 ¹⁴ After sending this letter, Vary discovered – and produced – all communications
 (which were text messages) between himself and Rapp's counsel. Jassy Decl. ¶ 8.

1 requiring a non-party to produce a privilege log under any circumstances, let alone where
 2 the non-party was making categorical assertions of privilege and was being asked to
 3 comb through *years* of potentially responsive documents and communications that he
 4 would withhold on privilege grounds in any event. Ex. 7 at 9-10. Fowler's counsel
 5 provided no such authority. By contrast, Vary provided authority supporting Vary's
 6 position that such a log was not necessary and should not be imposed on Vary. Ex. 7 at
 7 10 (citing *Perry v. Schwarzenegger*, 268 F.R.D. 344, 353 (N.D. Cal. 2010) (in order to
 8 reduce and eliminate unnecessary burdens on non-party, district court upheld magistrate
 9 judge's ruling that non-party did not have to create a privilege log); *Xcentric Ventures,*
 10 *LLC v. Borodkin*, 934 F.Supp.2d 1125, 1147 (D. Ariz. 2013) (recognizing unfairness of
 11 requiring a non-party to generate a privilege log where the underlying materials would
 12 be privileged in any event)). Fowler's portion of this joint stipulation does not address
 13 that authority.

14 Fowler issued three document subpoenas to Vary, two with 30 requests and one
 15 with 29 requests. Even one subpoena to a non-party with 29 requests is, on its face, not
 16 consistent with counsel's obligation to take "reasonable steps to avoid imposing undue
 17 burden or expense" on a subpoenaed non-party. FRCP 45(d)(1). Fowler's counsel
 18 considered it a compromise to drop just one of 30 requests, and not to seek confidential
 19 sources. It is important to recall that California's Shield Law and the First Amendment
 20 privilege apply whether or not information is confidential. *See Shoen I*, 5 F.3d at 1295;
 21 *Shoen II*, 48 F.3d at 414; *Delaney*, 50 Cal. 3d at 798; *New York Times*, 51 Cal. 3d at 461-
 22 *Miller*, 21 Cal. 4th at 897.

23 It is plain that Fowler (Kevin Spacey) is a well-financed litigant who knows that
 24 it was Vary's good reporting that opened the floodgates of accusations against Fowler,
 25 by not just Rapp but many others. Fowler knew he had no suit against Vary, having
 26 apologized for what "what would have been deeply inappropriate drunken behavior."
 27 Ex. 10 at 4. Instead, he is piling on Vary and making every effort possible to burden and
 28 harass him – with an over seven-hour deposition, 29+ document demands (delivered

1 three times) and now this motion – all with the unabashed aim to strip Vary of his
 2 constitutional rights. Fowler's conduct is an abusive and harassing vendetta against a
 3 non-party.

4 Vary respectfully requests that the Court award fees and cost sanctions against
 5 Fowler under its inherent power and/or FRCP 45(d)(2)(B)(ii). *See also Legal Voice v.*
 6 *Stormans Inc.*, 738 F.3d 1178, 1184 (9th Cir. 2013); *Nitsch v. DreamWorks Animation*
 7 *SKG Inc.*, 2017 WL 930809 (N.D. Cal. Mar. 9, 2017). Vary's counsel has incurred more
 8 than \$18,000 in fees and costs on this motion alone, *not including* sitting for a more than
 9 seven-hour deposition and responding to Fowler's *seriatum* subpoenas. Jassy Decl. ¶ 9.

10 Finally, Vary does not want to burden the Court with repetitive analyses with
 11 respect to all of the following Requests. Instead, Vary will refer back to this Response,
 12 and note any particular additional issues that may be unique to other Requests. For
 13 example, to avoid repetition, Vary notes that each of Fowler's broad requests calling for
 14 "All Documents concerning" various subjects arguably encompasses attorney-client
 15 privileged materials that Vary should not have to disclose.

16

17

B. Document Request No. 2

18

Mr. Fowler's Request No. 2:

19

All Documents Concerning any Communication between You and Plaintiff about

Fowler's alleged sexual abuse and/or assault of Plaintiff.

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21

Mr. Vary's Response to Request No. 2:

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Vary incorporates by reference, as if fully set forth herein, the General Objections set forth above. Vary objects to this Request to the extent that it calls for material protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request to the extent that it calls for material protected from disclosure by the attorney-client privilege, the attorney work product doctrine, and any other applicable privilege or doctrine. Vary objects to this Request to the extent it calls for the disclosure of material protected from disclosure by the right to privacy. Vary objects to this Request as vague,

1 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 2 extent that it calls for material that is publicly available and/or equally accessible to the
 3 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 4 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 5 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 6 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 7 burden associated with searching for and producing potentially responsive materials, if
 8 any, is not proportionate to the relevance, if any, of the requested material.

9 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 10 to Document Request No. 2 :***

11 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 12 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 13 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 14 made no showing that any reporters' privilege/shield applies to some or all documents
 15 called for by this request. Even if some material were covered by that protection, it does
 16 not apply for the reasons explained above, especially given there is no suggestion it
 17 implicates confidential information. During the meet and confer conference between
 18 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 19 confidential sources. The material sought by this request cannot be obtained elsewhere
 20 and is necessary for important issues in this case, including Rapp's credibility and the
 21 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 22 information.

23 Mr. Vary's other objections likewise are without merit. This request does not call
 24 for any attorney-client privileged or work product information, nor has Vary shown
 25 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 26 Vary already has known about and implicitly acquiesced to the production of his text
 27 messages with Rapp.

28

1 Mr. Vary's claims that this request calls for material outside his possession or
 2 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 3 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 4 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 5 acknowledged he has not even attempted to look for any documents responsive to the
 6 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 7 unsubstantiated and illusory.

8 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 9 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 10 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 11 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 12 – must “describe the nature of the withheld documents, communications, or tangible
 13 things in a manner that, without revealing information itself privileged or protected, will
 14 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 15 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 16 responsive documents.

17 ***Mr. Vary's Statement Regarding Request No. 2:***

18 Vary respectfully refers the Court to his statement regarding Request No. 1.

19
 20 ***C. Document Request No. 3***

21 ***Mr. Fowler's Request No. 3:***

22 All Documents Concerning any action You took relating to Fowler's alleged
 23 sexual abuse and/or assault of Plaintiff after learning of it.

24 ***Mr. Vary's Response to Request No. 3:***

25 Vary incorporates by reference, as if fully set forth herein, the General Objections
 26 set forth above. Vary objects to this Request to the extent that it calls for material
 27 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 28 to the extent that it calls for material protected from disclosure by the attorney-client

1 privilege, the attorney work product doctrine, and any other applicable privilege or
 2 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 3 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 4 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 5 extent that it calls for material that is publicly available and/or equally accessible to the
 6 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 7 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 8 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 9 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 10 burden associated with searching for and producing potentially responsive materials, if
 11 any, is not proportionate to the relevance, if any, of the requested material.

12 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
 13 ***to Document Request No. 3:***

14 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 15 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 16 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 17 made no showing that any reporters' privilege/shield applies to some or all documents
 18 called for by this request. Even if some material were covered by that protection, it does
 19 not apply for the reasons explained above, especially given there is no suggestion it
 20 implicates confidential information. During the meet and confer conference between
 21 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 22 confidential sources. The material sought by this request cannot be obtained elsewhere
 23 and is necessary for important issues in this case, including Rapp's credibility and the
 24 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 25 information.

26 Mr. Vary's other objections likewise are without merit. This request does not call
 27 for any attorney-client privileged or work product information, nor has Vary shown
 28 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.

1 Vary already has known about and implicitly acquiesced to the production of his text
 2 messages with Rapp.

3 Mr. Vary's claims that this request calls for material outside his possession or
 4 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 5 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 6 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 7 acknowledged he has not even attempted to look for any documents responsive to the
 8 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 9 unsubstantiated and illusory.

10 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 11 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 12 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 13 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 14 – must “describe the nature of the withheld documents, communications, or tangible
 15 things in a manner that, without revealing information itself privileged or protected, will
 16 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 17 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 18 responsive documents.

19 ***Mr. Vary's Statement Regarding Request No. 3:***

20 Vary respectfully refers the Court to his statement regarding Request No. 1.

22 **D. Document Request No. 4**

23 ***Mr. Fowler's Request No. 4:***

24 All Documents Concerning any Communication between You and Plaintiff about
 25 any claim by Plaintiff of sexual misconduct or sexual assault.

26 ***Mr. Vary's Response to Request No. 4:***

27 Vary incorporates by reference, as if fully set forth herein, the General Objections
 28 set forth above. Vary objects to this Request to the extent that it calls for material

1 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 2 to the extent that it calls for material protected from disclosure by the attorney-client
 3 privilege, the attorney work product doctrine, and any other applicable privilege or
 4 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 5 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 6 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 7 extent that it calls for material that is publicly available and/or equally accessible to the
 8 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 9 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 10 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 11 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 12 burden associated with searching for and producing potentially responsive materials, if
 13 any, is not proportionate to the relevance, if any, of the requested material.

14 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 15 to Document Request No. 4:***

16 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 17 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 18 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 19 made no showing that any reporters' privilege/shield applies to some or all documents
 20 called for by this request. Even if some material were covered by that protection, it does
 21 not apply for the reasons explained above, especially given there is no suggestion it
 22 implicates confidential information. During the meet and confer conference between
 23 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 24 confidential sources. The material sought by this request cannot be obtained elsewhere
 25 and is necessary for important issues in this case, including Rapp's credibility and the
 26 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 27 information.

28

1 Mr. Vary's other objections likewise are without merit. This request does not call
 2 for any attorney-client privileged or work product information, nor has Vary shown
 3 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 4 Vary already has known about and implicitly acquiesced to the production of his text
 5 messages with Rapp.

6 Mr. Vary's claims that this request calls for material outside his possession or
 7 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 8 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 9 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 10 acknowledged he has not even attempted to look for any documents responsive to the
 11 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 12 unsubstantiated and illusory.

13 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 14 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 15 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 16 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 17 – must “describe the nature of the withheld documents, communications, or tangible
 18 things in a manner that, without revealing information itself privileged or protected, will
 19 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 20 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 21 responsive documents.

22 ***Mr. Vary's Statement Regarding Request No. 4:***

23 Vary respectfully refers the Court to his statement regarding Request No. 1.

25 **E. Document Request No. 5**

26 ***Mr. Fowler's Request No. 5:***

27 All Documents Concerning any action You took relating to Fowler's alleged
 28 sexual abuse and/or assault of Plaintiff after learning of it.

1 ***Mr. Vary's Response to Request No. 5:***

2 Vary incorporates by reference, as if fully set forth herein, the General Objections
3 set forth above. Vary objects to this Request to the extent that it calls for material
4 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
5 to the extent that it calls for material protected from disclosure by the attorney-client
6 privilege, the attorney work product doctrine, and any other applicable privilege or
7 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
8 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
9 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
10 extent that it calls for material that is publicly available and/or equally accessible to the
11 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
12 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
13 it calls for material that is not relevant and/or not reasonably calculated to lead to the
14 discovery of admissible evidence. Vary objects to this Request on the grounds that the
15 burden associated with searching for

16 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
17 to Document Request No. 5:***

18 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
19 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
20 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
21 made no showing that any reporters' privilege/shield applies to some or all documents
22 called for by this request. Even if some material were covered by that protection, it does
23 not apply for the reasons explained above, especially given there is no suggestion it
24 implicates confidential information. During the meet and confer conference between
25 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
26 confidential sources. The material sought by this request cannot be obtained elsewhere
27 and is necessary for important issues in this case, including Rapp's credibility and the
28

1 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 2 information.

3 Mr. Vary's other objections likewise are without merit. This request does not call
 4 for any attorney-client privileged or work product information, nor has Vary shown
 5 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 6 Vary already has known about and implicitly acquiesced to the production of his text
 7 messages with Rapp.

8 Mr. Vary's claims that this request calls for material outside his possession or
 9 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 10 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 11 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 12 acknowledged he has not even attempted to look for any documents responsive to the
 13 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 14 unsubstantiated and illusory.

15 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 16 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 17 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 18 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 19 – must “describe the nature of the withheld documents, communications, or tangible
 20 things in a manner that, without revealing information itself privileged or protected, will
 21 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 22 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 23 responsive documents.

24 ***Mr. Vary's Statement Regarding Request No. 5:***

25 Vary respectfully refers the Court to his statement regarding Request No. 1.

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27

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1 **F. Document Request No. 6**

2 ***Mr. Fowler's Request No. 6:***

3 All Documents in Your custody, possession, or control Concerning any claim by
4 Plaintiff that he was a victim of sexual misconduct or sexual assault.

5 ***Mr. Vary's Response to Request No. 6:***

6 Vary incorporates by reference, as if fully set forth herein, the General Objections
7 set forth above. Vary objects to this Request to the extent that it calls for material
8 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
9 to the extent that it calls for material protected from disclosure by the attorney-client
10 privilege, the attorney work product doctrine, and any other applicable privilege or
11 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
12 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
13 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
14 extent that it calls for material that is publicly available and/or equally accessible to the
15 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
16 in Vary's possession, custody or control. Vary objects to this Request to the extent that it
17 calls for material that is not relevant and/or not reasonably calculated to lead to the
18 discovery of admissible evidence. Vary objects to this Request on the grounds that the
19 burden associated with searching for and producing potentially responsive materials, if
20 any, is not proportionate to the relevance, if any, of the requested material.

21 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
22 to Document Request No. 6:***

23 Mr. Vary's objections to this request are without merit. Mr. Vary's
24 objections based on the "Reporter's Privilege/Shield" are inapposite for the same reasons
25 discussed above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years.
26 He has made no showing that any reporters' privilege/shield applies to some or all
27 documents called for by this request. Even if some material were covered by that
28 protection, it does not apply for the reasons explained above, especially given there is no

1 suggestion it implicates confidential information. During the meet and confer conference
2 between counsel, Mr. Fowler limited the scope by stating he is not seeking information
3 from confidential sources. The material sought by this request cannot be obtained
4 elsewhere and is necessary for important issues in this case, including Rapp's credibility
5 and the details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
6 information.

7 Mr. Vary's other objections likewise are without merit. This request does not call
8 for any attorney-client privileged or work product information, nor has Vary shown
9 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
10 Vary already has known about and implicitly acquiesced to the production of his text
11 messages with Rapp.

12 Mr. Vary's claims that this request calls for material outside his possession or
13 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
14 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
15 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
16 acknowledged he has not even attempted to look for any documents responsive to the
17 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
18 unsubstantiated and illusory.

19 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
20 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
21 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
22 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
23 – must “describe the nature of the withheld documents, communications, or tangible
24 things in a manner that, without revealing information itself privileged or protected, will
25 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
26 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
27 responsive documents.

28

1 ***Mr. Vary's Statement Regarding Request No. 6:***

2 Vary respectfully refers the Court to his statement regarding Request No. 1.

4 **G. Document Request No. 9**

5 ***Mr. Fowler's Request No. 9:***

6 All Documents Concerning any Communication between You and Plaintiff about
7 any sexual encounter involving Plaintiff.

8 ***Mr. Vary's Response to Request No. 9:***

9 Vary incorporates by reference, as if fully set forth herein, the General Objections
10 set forth above. Vary objects to this Request to the extent that it calls for material
11 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
12 to the extent that it calls for material protected from disclosure by the attorney-client
13 privilege, the attorney work product doctrine, and any other applicable privilege or
14 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
15 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
16 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
17 extent that it calls for material that is publicly available and/or equally accessible to the
18 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
19 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
20 it calls for material that is not relevant and/or not reasonably calculated to lead to the
21 discovery of admissible evidence. Vary objects to this Request on the grounds that the
22 burden associated with searching for and producing potentially responsive materials, if
23 any, is not proportionate to the relevance, if any, of the requested material.

24 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
25 to Document Request No. 9:***

26 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
27 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
28 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has

1 made no showing that any reporters' privilege/shield applies to some or all documents
 2 called for by this request. Even if some material were covered by that protection, it does
 3 not apply for the reasons explained above, especially given there is no suggestion it
 4 implicates confidential information. During the meet and confer conference between
 5 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 6 confidential sources. The material sought by this request cannot be obtained elsewhere
 7 and is necessary for important issues in this case, including Rapp's credibility and the
 8 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 9 information.

10 Mr. Vary's other objections likewise are without merit. This request does not call
 11 for any attorney-client privileged or work product information, nor has Vary shown
 12 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 13 Vary already has known about and implicitly acquiesced to the production of his text
 14 messages with Rapp.

15 Mr. Vary's claims that this request calls for material outside his possession or
 16 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 17 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 18 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 19 acknowledged he has not even attempted to look for any documents responsive to the
 20 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 21 unsubstantiated and illusory.

22 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 23 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 24 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 25 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 26 – must “describe the nature of the withheld documents, communications, or tangible
 27 things in a manner that, without revealing information itself privileged or protected, will
 28 enable the parties to assess the claim.” Mr. Vary has not provided such information here.

1 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 2 responsive documents.

3 ***Mr. Vary's Statement Regarding Request No. 9:***

4 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 5 adds that this overbroad request calls for an unwarranted invasion of the right to privacy.
 6

7 **H. Document Request No. 11**

8 ***Mr. Fowler's Request No. 11:***

9 All Documents Concerning Any Communication between You and Plaintiff about
 10 any psychological injury or emotional distress suffered by Plaintiff.

11 ***Mr. Vary's Response to Request No. 11:***

12 Vary incorporates by reference, as if fully set forth herein, the General Objections
 13 set forth above. Vary objects to this Request to the extent that it calls for material
 14 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 15 to the extent that it calls for material protected from disclosure by the attorney-client
 16 privilege, the attorney work product doctrine, and any other applicable privilege or
 17 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 18 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 19 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 20 extent that it calls for material that is publicly available and/or equally accessible to the
 21 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 22 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 23 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 24 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 25 burden associated with searching for and producing potentially responsive materials, if
 26 any, is not proportionate to the relevance, if any, of the requested material.

27

28

1 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
 2 ***to Document Request No. 11:***

3 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 4 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 5 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 6 made no showing that any reporters' privilege/shield applies to some or all documents
 7 called for by this request. Even if some material were covered by that protection, it does
 8 not apply for the reasons explained above, especially given there is no suggestion it
 9 implicates confidential information. During the meet and confer conference between
 10 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 11 confidential sources. The material sought by this request cannot be obtained elsewhere
 12 and is necessary for important issues in this case, including Rapp's credibility and the
 13 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 14 information.

15 Mr. Vary's other objections likewise are without merit. This request does not call
 16 for any attorney-client privileged or work product information, nor has Vary shown
 17 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 18 Vary already has known about and implicitly acquiesced to the production of his text
 19 messages with Rapp.

20 Mr. Vary's claims that this request calls for material outside his possession or
 21 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 22 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 23 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 24 acknowledged he has not even attempted to look for any documents responsive to the
 25 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 26 unsubstantiated and illusory.

27 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 28 the asserted reporter's privilege or reporter's shield at this time, he should produce a log

1 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 2 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 3 – must “describe the nature of the withheld documents, communications, or tangible
 4 things in a manner that, without revealing information itself privileged or protected, will
 5 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 6 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 7 responsive documents.

8 ***Mr. Vary's Statement Regarding Request No. 11:***

9 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 10 adds that this overbroad request calls for an unwarranted invasion of the right to privacy.
 11

12 **I. Document Request No. 12**

13 ***Mr. Fowler's Request No. 12:***

14 All Documents Concerning any Communication between You and Plaintiff about
 15 Plaintiff's experience working on Broadway in “Precious Sons” in approximately 1986.

16 ***Mr. Vary's Response to Request No. 12:***

17 Vary incorporates by reference, as if fully set forth herein, the General Objections
 18 set forth above. Vary objects to this Request to the extent that it calls for material
 19 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 20 to the extent that it calls for material protected from disclosure by the attorney-client
 21 privilege, the attorney work product doctrine, and any other applicable privilege or
 22 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 23 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 24 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 25 extent that it calls for material that is publicly available and/or equally accessible to the
 26 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 27 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 28 it calls for material that is not relevant and/or not reasonably calculated to lead to the

1 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 2 burden associated with searching for and producing potentially responsive materials, if
 3 any, is not proportionate to the relevance, if any, of the requested material.

4 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 5 to Document Request No. 12:***

6 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 7 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 8 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 9 made no showing that any reporters' privilege/shield applies to some or all documents
 10 called for by this request. Even if some material were covered by that protection, it does
 11 not apply for the reasons explained above, especially given there is no suggestion it
 12 implicates confidential information. During the meet and confer conference between
 13 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 14 confidential sources. The material sought by this request cannot be obtained elsewhere
 15 and is necessary for important issues in this case, including Rapp's credibility and the
 16 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 17 information.

18 Mr. Vary's other objections likewise are without merit. This request does not call
 19 for any attorney-client privileged or work product information, nor has Vary shown
 20 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 21 Vary already has known about and implicitly acquiesced to the production of his text
 22 messages with Rapp.

23 Mr. Vary's claims that this request calls for material outside his possession or
 24 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 25 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 26 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 27 acknowledged he has not even attempted to look for any documents responsive to the
 28

1 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 2 unsubstantiated and illusory.

3 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 4 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 5 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 6 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 7 – must “describe the nature of the withheld documents, communications, or tangible
 8 things in a manner that, without revealing information itself privileged or protected, will
 9 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 10 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 11 responsive documents.

12 ***Mr. Vary's Statement Regarding Request No. 12:***

13 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 14 adds that this Request is not relevant to this action, and Fowler does not explain how it
 15 could be.

16

17 **J. Document Request No. 13**

18 ***Mr. Fowler's Request No. 13:***

19 All Documents Concerning any Communication between You and Plaintiff about
 20 Plaintiffs experience working on Broadway in “The Little Prince.”

21 ***Mr. Vary's Response to Request No . 13:***

22 Vary incorporates by reference, as if fully set forth herein, the General Objections
 23 set forth above. Vary objects to this Request to the extent that it calls for material
 24 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 25 to the extent that it calls for material protected from disclosure by the attorney-client
 26 privilege, the attorney work product doctrine, and any other applicable privilege or
 27 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 28 protected from disclosure by the right to privacy. Vary objects to this Request as vague,

1 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
2 extent that it calls for material that is publicly available and/or equally accessible to the
3 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
4 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
5 it calls for material that is not relevant and/or not reasonably calculated to lead to the
6 discovery of admissible evidence. Vary objects to this Request on the grounds that the
7 burden associated with searching for and producing potentially responsive materials, if
8 any, is not proportionate to the relevance, if any, of the requested material.

9 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
10 to Document Request No. 13:***

11 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
12 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
13 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
14 made no showing that any reporters' privilege/shield applies to some or all documents
15 called for by this request. Even if some material were covered by that protection, it does
16 not apply for the reasons explained above, especially given there is no suggestion it
17 implicates confidential information. During the meet and confer conference between
18 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
19 confidential sources. The material sought by this request cannot be obtained elsewhere
20 and is necessary for important issues in this case, including Rapp's credibility and the
21 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
22 information.

23 Mr. Vary's other objections likewise are without merit. This request does not call
24 for any attorney-client privileged or work product information, nor has Vary shown
25 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
26 Vary already has known about and implicitly acquiesced to the production of his text
27 messages with Rapp.

28

1 Mr. Vary's claims that this request calls for material outside his possession or
 2 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 3 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 4 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 5 acknowledged he has not even attempted to look for any documents responsive to the
 6 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 7 unsubstantiated and illusory.

8 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 9 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 10 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 11 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 12 – must “describe the nature of the withheld documents, communications, or tangible
 13 things in a manner that, without revealing information itself privileged or protected, will
 14 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 15 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 16 responsive documents.

17 ***Mr. Vary's Statement Regarding Request No. 13:***

18 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 19 adds that this Request is not relevant to this action, and Fowler does not explain how it
 20 could be.

21
 22 **K. Document Request No. 14**

23 ***Mr. Fowler's Request No. 14:***

24 All Documents Concerning any Communication between You and Plaintiff about
 25 Plaintiffs' experience working as an actor in New York before he turned 18 years old.

26 ***Mr. Vary's Response to Request No. 14:***

27 Vary incorporates by reference, as if fully set forth herein, the General Objections
 28 set forth above. Vary objects to this Request to the extent that it calls for material

1 protected from disclosure by the Reporter ' s Privilege/Shield. Vary objects to this
2 Request to the extent that it calls for material protected from disclosure by the attorney-
3 client privilege, the attorney work product doctrine, and any other applicable privilege
4 or doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
5 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
6 ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent
7 that it calls for material that is publicly available and/or equally accessible to the
8 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
9 in Vary ' s possession, custody or control. Vary objects to this Request to the extent that
10 it calls for material that is not relevant and/or not reasonably calculated to lead to the
11 discovery of admissible evidence. Vary objects to this Request on the grounds that the
12 burden associated with searching for and producing potentially responsive materials, if
13 any, is not proportionate to the relevance, if any, of the requested material.

14 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
15 to Document Request No. 14:***

16 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
17 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
18 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
19 made no showing that any reporters' privilege/shield applies to some or all documents
20 called for by this request. Even if some material were covered by that protection, it does
21 not apply for the reasons explained above, especially given there is no suggestion it
22 implicates confidential information. During the meet and confer conference between
23 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
24 confidential sources. The material sought by this request cannot be obtained elsewhere
25 and is necessary for important issues in this case, including Rapp's credibility and the
26 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
27 information.

28

1 Mr. Vary's other objections likewise are without merit. This request does not call
2 for any attorney-client privileged or work product information, nor has Vary shown
3 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
4 Vary already has known about and implicitly acquiesced to the production of his text
5 messages with Rapp.

6 Mr. Vary's claims that this request calls for material outside his possession or
7 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
8 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
9 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
10 acknowledged he has not even attempted to look for any documents responsive to the
11 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
12 unsubstantiated and illusory.

13 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
14 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
15 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
16 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
17 – must “describe the nature of the withheld documents, communications, or tangible
18 things in a manner that, without revealing information itself privileged or protected, will
19 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
20 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
21 responsive documents.

22 ***Mr. Vary's Statement Regarding Request No. 14:***

23 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
24 adds that this Request is not relevant to this action, and Fowler does not explain how it
25 could be.

26
27
28

1 **L. Document Request No. 15**2 ***Mr. Fowler's Request No. 15:***3 All Documents Concerning any Communication between You and Plaintiff about
4 Yul Brynner.5 ***Mr. Vary's Response to Request No . 15:***6 Vary incorporates by reference, as if fully set forth herein, the General Objections
7 set forth above. Vary objects to this Request to the extent that it calls for material
8 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
9 to the extent that it calls for material protected from disclosure by the attorney-client
10 privilege, the attorney work product doctrine, and any other applicable privilege or
11 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
12 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
13 ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent
14 that it calls for material that is publicly available and/or equally accessible to the
15 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
16 in Vary's possession, custody or control. Vary objects to this Request to the extent that it
17 calls for material that is not relevant and/or not reasonably calculated to lead to the
18 discovery of admissible evidence. Vary objects to this Request on the grounds that the
19 burden associated with searching for and producing potentially responsive materials, if
20 any, is not proportionate to the relevance, if any, of the requested material.21 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
22 to Document Request No. 15:***23 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
24 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
25 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
26 made no showing that any reporters' privilege/shield applies to some or all documents
27 called for by this request. Even if some material were covered by that protection, it does
28 not apply for the reasons explained above, especially given there is no suggestion it

1 implicates confidential information. During the meet and confer conference between
 2 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 3 confidential sources. The material sought by this request cannot be obtained elsewhere
 4 and is necessary for important issues in this case, including Rapp's credibility and the
 5 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 6 information.

7 Mr. Vary's other objections likewise are without merit. This request does not call
 8 for any attorney-client privileged or work product information, nor has Vary shown
 9 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 10 Vary already has known about and implicitly acquiesced to the production of his text
 11 messages with Rapp.

12 Mr. Vary's claims that this request calls for material outside his possession or
 13 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 14 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 15 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 16 acknowledged he has not even attempted to look for any documents responsive to the
 17 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 18 unsubstantiated and illusory.

19 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 20 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 21 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 22 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 23 – must “describe the nature of the withheld documents, communications, or tangible
 24 things in a manner that, without revealing information itself privileged or protected, will
 25 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 26 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 27 responsive documents.

28

1 ***Mr. Vary's Statement Regarding Request No. 15:***

2 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
3 adds that this Request is not relevant to this action, and Fowler does not explain how it
4 could be.

5

6 **M. Document Request No. 16**

7 ***Mr. Fowler's Request No. 16:***

8 All Documents Concerning any Communication between You and Plaintiff about
9 Susan Tyrell.

10 ***Mr. Vary's Response to Request No. 16:***

11 Vary incorporates by reference, as if fully set forth herein, the General Objections
12 set forth above. Vary objects to this Request to the extent that it calls for material
13 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
14 to the extent that it calls for material protected from disclosure by the attorney-client
15 privilege, the attorney work product doctrine, and any other applicable privilege or
16 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
17 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
18 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
19 extent that it calls for material that is publicly available and/or equally accessible to the
20 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
21 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
22 it calls for material that is not relevant and/or not reasonably calculated to lead to the
23 discovery of admissible evidence. Vary objects to this Request on the grounds that the
24 burden associated with searching for and producing potentially responsive materials, if
25 any, is not proportionate to the relevance, if any, of the requested material.

1 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
 2 ***to Document Request No. 16:***

3 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 4 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 5 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 6 made no showing that any reporters' privilege/shield applies to some or all documents
 7 called for by this request. Even if some material were covered by that protection, it does
 8 not apply for the reasons explained above, especially given there is no suggestion it
 9 implicates confidential information. During the meet and confer conference between
 10 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 11 confidential sources. The material sought by this request cannot be obtained elsewhere
 12 and is necessary for important issues in this case, including Rapp's credibility and the
 13 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 14 information.

15 Mr. Vary's other objections likewise are without merit. This request does not call
 16 for any attorney-client privileged or work product information, nor has Vary shown
 17 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 18 Vary already has known about and implicitly acquiesced to the production of his text
 19 messages with Rapp.

20 Mr. Vary's claims that this request calls for material outside his possession or
 21 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 22 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 23 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 24 acknowledged he has not even attempted to look for any documents responsive to the
 25 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 26 unsubstantiated and illusory.

27 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 28 the asserted reporter's privilege or reporter's shield at this time, he should produce a log

1 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 2 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 3 – must “describe the nature of the withheld documents, communications, or tangible
 4 things in a manner that, without revealing information itself privileged or protected, will
 5 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 6 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 7 responsive documents.

8 ***Mr. Vary’s Statement Regarding Request No. 16:***

9 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 10 adds that this Request is not relevant to this action, and Fowler does not explain how it
 11 could be.

12
 13 **N. Document Request No. 17**

14 ***Mr. Fowler’s Request No. 17:***

15 All Documents Concerning any Communication between You and Plaintiff about
 16 Ed Harris.

17 ***Mr. Vary’s Response to Request No. 17:***

18 Vary incorporates by reference, as if fully set forth herein, the General Objections
 19 set forth above. Vary objects to this Request to the extent that it calls for material
 20 protected from disclosure by the Reporter’s Privilege/Shield. Vary objects to this Request
 21 to the extent that it calls for material protected from disclosure by the attorney-client
 22 privilege, the attorney work product doctrine, and any other applicable privilege or
 23 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 24 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 25 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 26 extent that it calls for material that is publicly available and/or equally accessible to the
 27 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 28 in Vary’s possession, custody, or control. Vary objects to this Request to the extent that

1 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 2 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 3 burden associated with searching for and producing potentially responsive materials, if
 4 any, is not proportionate to the relevance, if any, of the requested material.

5 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 6 to Document Request No. 17:***

7 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 8 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 9 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 10 made no showing that any reporters' privilege/shield applies to some or all documents
 11 called for by this request. Even if some material were covered by that protection, it does
 12 not apply for the reasons explained above, especially given there is no suggestion it
 13 implicates confidential information. During the meet and confer conference between
 14 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 15 confidential sources. The material sought by this request cannot be obtained elsewhere
 16 and is necessary for important issues in this case, including Rapp's credibility and the
 17 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 18 information.

19 Mr. Vary's other objections likewise are without merit. This request does not call
 20 for any attorney-client privileged or work product information, nor has Vary shown
 21 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 22 Vary already has known about and implicitly acquiesced to the production of his text
 23 messages with Rapp.

24 Mr. Vary's claims that this request calls for material outside his possession or
 25 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 26 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 27 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 28 acknowledged he has not even attempted to look for any documents responsive to the

1 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 2 unsubstantiated and illusory.

3 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 4 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 5 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 6 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 7 – must “describe the nature of the withheld documents, communications, or tangible
 8 things in a manner that, without revealing information itself privileged or protected, will
 9 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 10 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 11 responsive documents.

12 ***Mr. Vary's Statement Regarding Request No. 17:***

13 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 14 adds that this Request is not relevant to this action, and Fowler does not explain how it
 15 could be.

16

17 **O. Document Request No. 18**

18 ***Mr. Fowler's Request No. 18:***

19 All Documents Concerning any Communication between You and Plaintiff about
 20 Amy Madigan.

21 ***Mr. Vary's Response to Request No. 18:***

22 Vary incorporates by reference, as if fully set forth herein, the General Objections
 23 set forth above. Vary objects to this Request to the extent that it calls for material
 24 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 25 to the extent that it calls for material protected from disclosure by the attorney-client
 26 privilege, the attorney work product doctrine, and any other applicable privilege or
 27 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 28 protected from disclosure by the right to privacy. Vary objects to this Request as vague,

1 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
2 extent that it calls for material that is publicly available and/or equally accessible to the
3 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
4 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
5 it calls for material that is not relevant and/or not reasonably calculated to lead to the
6 discovery of admissible evidence. Vary objects to this Request on the grounds that the
7 burden associated with searching for and producing potentially responsive materials, if
8 any, is not proportionate to the relevance, if any, of the requested material.

9 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
10 to Document Request No. 18:***

11 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
12 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
13 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
14 made no showing that any reporters' privilege/shield applies to some or all documents
15 called for by this request. Even if some material were covered by that protection, it does
16 not apply for the reasons explained above, especially given there is no suggestion it
17 implicates confidential information. During the meet and confer conference between
18 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
19 confidential sources. The material sought by this request cannot be obtained elsewhere
20 and is necessary for important issues in this case, including Rapp's credibility and the
21 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
22 information.

23 Mr. Vary's other objections likewise are without merit. This request does not call
24 for any attorney-client privileged or work product information, nor has Vary shown
25 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
26 Vary already has known about and implicitly acquiesced to the production of his text
27 messages with Rapp.

28

1 Mr. Vary's claims that this request calls for material outside his possession or
 2 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 3 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 4 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 5 acknowledged he has not even attempted to look for any documents responsive to the
 6 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 7 unsubstantiated and illusory.

8 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 9 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 10 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 11 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 12 – must “describe the nature of the withheld documents, communications, or tangible
 13 things in a manner that, without revealing information itself privileged or protected, will
 14 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 15 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 16 responsive documents.

17 ***Mr. Vary's Statement Regarding Request No. 18:***

18 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 19 adds that this Request is not relevant to this action, and Fowler does not explain how it
 20 could be.

21
 22 **P. Document Request No. 19**

23 ***Mr. Fowler's Request No. 19:***

24 All Documents Concerning any Communication between You and Fowler.

25 ***Mr. Vary's Response to Request No . 19:***

26 Vary incorporates by reference, as if fully set forth herein, the General Objections
 27 set forth above. Vary objects to this Request to the extent that it calls for material
 28 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request

1 to the extent that it calls for material protected from disclosure by the attorney-client
 2 privilege, the attorney work product doctrine, and any other applicable privilege or
 3 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 4 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 5 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 6 extent that it calls for material that is publicly available and/or equally accessible to the
 7 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 8 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 9 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 10 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 11 burden associated with searching for and producing potentially responsive materials, if
 12 any, is not proportionate to the relevance, if any, of the requested material.

13 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 14 to Document Request No. 19:***

15 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 16 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 17 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 18 made no showing that any reporters' privilege/shield applies to some or all documents
 19 called for by this request. Even if some material were covered by that protection, it does
 20 not apply for the reasons explained above, especially given there is no suggestion it
 21 implicates confidential information. During the meet and confer conference between
 22 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 23 confidential sources. The material sought by this request cannot be obtained elsewhere
 24 and is necessary for important issues in this case, including Rapp's credibility and the
 25 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 26 information.

27 Mr. Vary's other objections likewise are without merit. This request does not call
 28 for any attorney-client privileged or work product information, nor has Vary shown

1 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 2 Vary already has known about and implicitly acquiesced to the production of his text
 3 messages with Rapp.

4 Mr. Vary's claims that this request calls for material outside his possession or
 5 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 6 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 7 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 8 acknowledged he has not even attempted to look for any documents responsive to the
 9 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 10 unsubstantiated and illusory.

11 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 12 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 13 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 14 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 15 – must “describe the nature of the withheld documents, communications, or tangible
 16 things in a manner that, without revealing information itself privileged or protected, will
 17 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 18 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 19 responsive documents.

20 ***Mr. Vary's Statement Regarding Request No. 19:***

21 Vary respectfully refers the Court to his statement regarding Request No. 1.

23 **Q. Document Request No. 20**

24 ***Mr. Fowler's Request No. 20:***

25 All Documents Concerning any Communication between You and any Person
 26 about this lawsuit.

1 ***Mr. Vary's Response to Request No. 20:***

2 Vary incorporates by reference, as if fully set forth herein, the General Objections
3 set forth above. Vary objects to this Request to the extent that it calls for material
4 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
5 to the extent that it calls for material protected from disclosure by the attorney-client
6 privilege, the attorney work product doctrine, and any other applicable privilege or
7 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
8 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
9 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
10 extent that it calls for material that is publicly available and/or equally accessible to the
11 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
12 in Vary's possession, custody or control. Vary objects to this Request to the extent that
13 it calls for material that is not relevant and/ or not reasonably calculated to lead to the
14 discovery of admissible evidence. Vary objects to this Request on the grounds that the
15 burden associated with searching for and producing potentially responsive materials, if
16 any, is not proportionate to the relevance, if any, of the requested material.

17 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
18 to Document Request No. 20:***

19 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
20 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
21 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
22 made no showing that any reporters' privilege/shield applies to some or all documents
23 called for by this request. Even if some material were covered by that protection, it does
24 not apply for the reasons explained above, especially given there is no suggestion it
25 implicates confidential information. During the meet and confer conference between
26 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
27 confidential sources. The material sought by this request cannot be obtained elsewhere
28 and is necessary for important issues in this case, including Rapp's credibility and the

1 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 2 information.

3 Mr. Vary's other objections likewise are without merit. This request does not call
 4 for any attorney-client privileged or work product information, nor has Vary shown
 5 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 6 Vary already has known about and implicitly acquiesced to the production of his text
 7 messages with Rapp.

8 Mr. Vary's claims that this request calls for material outside his possession or
 9 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 10 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 11 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 12 acknowledged he has not even attempted to look for any documents responsive to the
 13 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 14 unsubstantiated and illusory.

15 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 16 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 17 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 18 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 19 – must “describe the nature of the withheld documents, communications, or tangible
 20 things in a manner that, without revealing information itself privileged or protected, will
 21 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 22 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 23 responsive documents.

24 ***Mr. Vary's Statement Regarding Request No. 20:***

25 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 26 adds that this Request improperly calls for the disclosure of documents protected from
 27 disclosure by the attorney-client privilege.

28

1 **R. Document Request No. 21**2 ***Mr. Fowler's Request No. 21:***

3 All Documents Concerning any Communication between You and Peter Saghir,
 4 Richard Steigman, Rachel Jacobs, or anyone else at the law firm Gair, Gair, Conason,
 5 Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, which is counsel for Plaintiff
 6 in this action.

7 ***Mr. Vary's Response to Request No. 21:***

8 Vary incorporates by reference, as if fully set forth herein, the General Objections
 9 set forth above. Vary objects to this Request to the extent that it calls for material
 10 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 11 to the extent that it calls for material protected from disclosure by the attorney-client
 12 privilege, the attorney work product doctrine, and any other applicable privilege or
 13 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 14 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 15 ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent
 16 that it calls for material that is publicly available and/or equally accessible to the
 17 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 18 in Vary's possession, custody or control. Vary objects to this Request to the extent that it
 19 calls for material that is not relevant and/or not reasonably calculated to lead to the
 20 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 21 burden associated with searching for and producing potentially responsive materials, if
 22 any, is not proportionate to the relevance, if any, of the requested material.

23 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 24 to Document Request No. 21:***

25 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 26 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 27 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 28 made no showing that any reporters' privilege/shield applies to some or all documents

1 called for by this request. Even if some material were covered by that protection, it does
2 not apply for the reasons explained above, especially given there is no suggestion it
3 implicates confidential information. During the meet and confer conference between
4 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
5 confidential sources. The material sought by this request cannot be obtained elsewhere
6 and is necessary for important issues in this case, including Rapp's credibility and the
7 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
8 information.

9 Mr. Vary's other objections likewise are without merit. This request does not call
10 for any attorney-client privileged or work product information, nor has Vary shown
11 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
12 Vary already has produced two of his text exchanges with Rapp's counsel, and any
13 remaining messages should also be produced.

14 Mr. Vary's claims that this request calls for material outside his possession or
15 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
16 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
17 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
18 acknowledged he has not even attempted to look for any documents responsive to the
19 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
20 unsubstantiated and illusory.

21 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
22 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
23 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
24 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
25 – must “describe the nature of the withheld documents, communications, or tangible
26 things in a manner that, without revealing information itself privileged or protected, will
27 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
28

1 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 2 responsive documents.

3 ***Mr. Vary's Statement Regarding Request No. 21:***

4 Vary already produced all of the responsive documents he has in response to this
 5 Request as Fowler's portion of the Joint Stipulation acknowledges.

6

7 **S. Document Request No. 26**

8 ***Mr. Fowler's Request No. 26:***

9 All Documents Concerning any Communication between You and any Person
 10 about Fowler.

11 ***Mr. Vary's Response to Request No. 26:***

12 Vary incorporates by reference, as if fully set forth herein, the General Objections
 13 set forth above. Vary objects to this Request to the extent that it calls for material
 14 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 15 to the extent that it calls for material protected from disclosure by the attorney-client
 16 privilege, the attorney work product doctrine, and any other applicable privilege or
 17 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 18 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 19 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 20 extent that it calls for material that is publicly available and/or equally accessible to the
 21 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 22 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 23 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 24 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 25 burden associated with searching for and producing potentially responsive materials, if
 26 any, is not proportionate to the relevance, if any, of the requested material.

27

28

1 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
 2 ***to Document Request No. 26:***

3 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 4 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 5 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 6 made no showing that any reporters' privilege/shield applies to some or all documents
 7 called for by this request. Even if some material were covered by that protection, it does
 8 not apply for the reasons explained above, especially given there is no suggestion it
 9 implicates confidential information. During the meet and confer conference between
 10 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 11 confidential sources. The material sought by this request cannot be obtained elsewhere
 12 and is necessary for important issues in this case, including Rapp's credibility and the
 13 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 14 information.

15 Mr. Vary's other objections likewise are without merit. This request does not call
 16 for any attorney-client privileged or work product information, nor has Vary shown
 17 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 18 Vary already has known about and implicitly acquiesced to the production of his text
 19 messages with Rapp.

20 Mr. Vary's claims that this request calls for material outside his possession or
 21 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 22 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 23 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 24 acknowledged he has not even attempted to look for any documents responsive to the
 25 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 26 unsubstantiated and illusory.

27 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 28 the asserted reporter's privilege or reporter's shield at this time, he should produce a log

1 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 2 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 3 – must “describe the nature of the withheld documents, communications, or tangible
 4 things in a manner that, without revealing information itself privileged or protected, will
 5 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 6 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 7 responsive documents.

8 ***Mr. Vary's Statement Regarding Request No. 26:***

9 Vary respectfully refers the Court to his statement regarding Request No. 1.
 10

11 **T. Document Request No. 27**

12 ***Mr. Fowler's Request No. 27:***

13 All Documents, Concerning the article You wrote for BuzzFeed News title, "Actor
 14 Anthony Rapp: Kevin Spacey Made a Sexual Advance Toward Me When I was 14."

15 ***Mr. Vary's Response to Request No. 27:***

16 Vary incorporates by reference, as if fully set forth herein, the General Objections
 17 set forth above. Vary objects to this Request to the extent that it calls for material
 18 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 19 to the extent that it calls for material protected from disclosure by the attorney-client
 20 privilege, the attorney work product doctrine, and any other applicable privilege or
 21 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 22 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 23 ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent
 24 that it calls for material that is publicly available and/or equally accessible to the
 25 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 26 in Vary's possession, custody or control. Vary objects to this Request to the extent that it
 27 calls for material that is not relevant and/or not reasonably calculated to lead to the
 28 discovery of admissible evidence. Vary objects to this Request on the grounds that the

1 burden associated with searching for and producing potentially responsive materials, if
 2 any, is not proportionate to the relevance, if any, of the requested material.

3 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 4 to Document Request No. 27:***

5 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 6 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 7 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 8 made no showing that any reporters' privilege/shield applies to some or all documents
 9 called for by this request. Even if some material were covered by that protection, it does
 10 not apply for the reasons explained above, especially given there is no suggestion it
 11 implicates confidential information. During the meet and confer conference between
 12 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 13 confidential sources. The material sought by this request cannot be obtained elsewhere
 14 and is necessary for important issues in this case, including Rapp's credibility and the
 15 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 16 information.

17 Mr. Vary's other objections likewise are without merit. This request does not call
 18 for any attorney-client privileged or work product information, nor has Vary shown
 19 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 20 Vary already has known about and implicitly acquiesced to the production of his text
 21 messages with Rapp.

22 Mr. Vary's claims that this request calls for material outside his possession or
 23 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 24 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 25 *See, e.g.*, Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 26 acknowledged he has not even attempted to look for any documents responsive to the
 27 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 28 unsubstantiated and illusory.

1 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 2 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 3 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 4 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 5 – must “describe the nature of the withheld documents, communications, or tangible
 6 things in a manner that, without revealing information itself privileged or protected, will
 7 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 8 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 9 responsive documents.

10 ***Mr. Vary's Statement Regarding Request No. 27:***

11 Vary respectfully refers the Court to his statement regarding Request No. 1.

13 **U. Document Request No. 28**

14 ***Mr. Fowler's Request No. 28:***

15 All Documents, Including notes, recordings from any interviews, drafts of articles,
 16 or any other materials, Concerning Mr. Rapp's allegations against Mr. Fowler.

17 ***Mr. Vary's Response to Request No. 28:***

18 Vary incorporates by reference, as if fully set forth herein, the General Objections
 19 set forth above. Vary objects to this Request to the extent that it calls for material
 20 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 21 to the extent that it calls for material protected from disclosure by the attorney-client
 22 privilege, the attorney work product doctrine, and any other applicable privilege or
 23 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 24 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 25 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 26 extent that it calls for material that is publicly available and/or equally accessible to the
 27 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 28 in Vary's possession, custody, or control. Vary objects to this Request to the extent that

1 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 2 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 3 burden associated with searching for and producing potentially responsive materials, if
 4 any, is not proportionate to the relevance, if any, of the requested material.

5 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 6 to Document Request No. 28:***

7 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 8 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 9 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 10 made no showing that any reporters' privilege/shield applies to some or all documents
 11 called for by this request. Even if some material were covered by that protection, it does
 12 not apply for the reasons explained above, especially given there is no suggestion it
 13 implicates confidential information. During the meet and confer conference between
 14 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 15 confidential sources. The material sought by this request cannot be obtained elsewhere
 16 and is necessary for important issues in this case, including Rapp's credibility and the
 17 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 18 information.

19 Mr. Vary's other objections likewise are without merit. This request does not call
 20 for any attorney-client privileged or work product information, nor has Vary shown
 21 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 22 Vary already has known about and implicitly acquiesced to the production of his text
 23 messages with Rapp.

24 Mr. Vary's claims that this request calls for material outside his possession or
 25 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 26 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 27 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 28 acknowledged he has not even attempted to look for any documents responsive to the

1 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 2 unsubstantiated and illusory.

3 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 4 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 5 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 6 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 7 – must “describe the nature of the withheld documents, communications, or tangible
 8 things in a manner that, without revealing information itself privileged or protected, will
 9 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 10 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 11 responsive documents.

12 ***Mr. Vary's Statement Regarding Request No. 28:***

13 Vary respectfully refers the Court to his statement regarding Request No. 1.

14

15 **V. Document Request No. 29**

16 ***Plaintiff's Request No. 29:***

17 All Documents in your custody, possession, or control Concerning Fowler.

18 ***Mr. Vary's Response to Request No . 29:***

19 Vary incorporates by reference, as if fully set forth herein, the General Objections
 20 set forth above. Vary objects to this Request to the extent that it calls for material
 21 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 22 to the extent that it calls for material protected from disclosure by the attorney-client
 23 privilege, the attorney work product doctrine, and any other applicable privilege or
 24 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 25 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 26 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 27 extent that it calls for material that is publicly available and/or equally accessible to the
 28 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not

1 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 2 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 3 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 4 burden associated with searching for and producing potentially responsive materials, if
 5 any, is not proportionate to the relevance, if any, of the requested material.

6 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response
 7 to Document Request No. 29:***

8 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 9 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 10 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 11 made no showing that any reporters' privilege/shield applies to some or all documents
 12 called for by this request. Even if some material were covered by that protection, it does
 13 not apply for the reasons explained above, especially given there is no suggestion it
 14 implicates confidential information. During the meet and confer conference between
 15 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 16 confidential sources. The material sought by this request cannot be obtained elsewhere
 17 and is necessary for important issues in this case, including Rapp's credibility and the
 18 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
 19 information.

20 Mr. Vary's other objections likewise are without merit. This request does not call
 21 for any attorney-client privileged or work product information, nor has Vary shown
 22 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 23 Vary already has known about and implicitly acquiesced to the production of his text
 24 messages with Rapp.

25 Mr. Vary's claims that this request calls for material outside his possession or
 26 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 27 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 28 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also

1 acknowledged he has not even attempted to look for any documents responsive to the
 2 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 3 unsubstantiated and illusory.

4 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 5 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 6 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 7 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 8 – must “describe the nature of the withheld documents, communications, or tangible
 9 things in a manner that, without revealing information itself privileged or protected, will
 10 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 11 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 12 responsive documents.

13 ***Mr. Vary's Statement Regarding Request No. 29:***

14 Vary respectfully refers the Court to his statement regarding Request No. 1.

15
 16
 17 Dated: January 31, 2022
 18 Irvine, California.

Respectfully submitted,

19 /s/ Chase A. Scolnick
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 21 Chase A. Scolnick
 22 Jay P. Barron
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*Counsel for Plaintiff Kevin Spacey
 Fowler a/k/a Kevin Spacey*

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2 Dated: February 9, 2022
3 Los Angeles, California.

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6
7
8 /s/ Jean-Paul Jassy

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17 *Counsel for Non-Party Journalist*
18 *Adam Vary*

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